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In The

Supreme Court of the United States

ROY L. HENDRICKS, Administrator, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, OCEAN COUNTY PROSECUTOR'S OFFICE,

Petitioners,

v.

PAUL KAMIENSKI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

MARLENE LYNCH FORD
Ocean County Prosecutor
By: SAMUEL J. MARZARELLA
Counsel of Record
ROBERTA DIBIASE
WILLIAM KYLE MEIGHAN
CN 2191
Toms River, NJ 08754
732-929-2027

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. What is the standard of review for a federal appellate court analyzing a sufficiency-of-evidence claim in a petition for habeas corpus under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2254(d)(1)?

2. Did enactment of the AEDPA eliminate the need for direct application of *Jackson v. Virginia*, 443 U.S. 307 (1979) by a federal habeas court considering a sufficiency-of-evidence claim, and replace it with the "unreasonable application" standard found in §2254(d)(1)?

A. Should a federal habeas court reviewing a state conviction under §2254(d)(1) confine itself to an analysis of the state court's discussion of facts and law; or

B. Should a federal habeas court reviewing a state conviction under §2254(d)(1) perform its own *de novo* analysis of the entire trial record in order to draw its own conclusions under the *Jackson* standard; and, if so,

C. Would such a *de novo* review of factual issues under §2254(d)(1) render §2254(d)(2) and (e)(1) superfluous?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption.

Petitioners are Roy L. Hendricks, Administrator; the Attorney General of the State of New Jersey; and the Ocean County Prosecutor's Office.

The Respondent is Paul Kamienski.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDIX	v
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	15
I. THIS COURT SHOULD CLARIFY, EXPOUND UPON, AND OTHERWISE GIVE MEANING TO THE "UNREASONABLE APPLICATION" CLAUSE OF 28 U.S.C. §2254(d)(1) IN A SUFFICIENCY-OF-EVIDENCE CLAIM	15
A. The Allocation Of Burdens Under §2254(d) Gives Meaning To The Unreasonable Application Clause Of Subsection (d)(1) And Indicates That *Jackson v. Virginia* Need Not And Should Not Be Applied By A Federal Habeas Court	17

TABLE OF CONTENTS – Continued

Page

B. The Meaning Of The "Unreasonable Application" Clause Depends Upon The Determinacy Of The Legal Rule To Be Applied And Is Ultimately Reasonable If, Where The Rule Is General, The Decision Fits Within A Wide Matrix Of Reasonable Decisions 21

II. THIS COURT SHOULD RESOLVE THE CONFLICT WITHIN AND AMONG THE CIRCUITS AS TO WHAT CONSTITUTES AN "UNREASONABLE APPLICATION" OF FEDERAL LAW IN A PETITION FOR HABEAS CORPUS UNDER §2254(d)(1) BASED ON A SUFFICIENCY-OF-EVIDENCE CLAIM 24

III. THE THIRD CIRCUIT COURT OF APPEALS REVIEWED THE RECORD *DE NOVO*, CONTRARY TO THE AEDPA. EVEN IF SUCH *DE NOVO* REVIEW WERE APPROPRIATE, THE THIRD CIRCUIT PERFORMED IT IMPROPERLY UNDER THE *JACKSON* STANDARD BY DRAWING ITS OWN INFERENCES IN FAVOR OF KAMIENSKI AND REJECTING INFERENCES FOUND BY THE APPELLATE COURT IN FAVOR OF THE STATE 28

A. The Third Circuit Applied The Wrong Legal Standards To This Case 28

TABLE OF CONTENTS – Continued

Page

B. As Part Of Its *De Novo* Review Of The Record, The Third Circuit Improperly Ignored Inferences Favorable To The State And Found Inferences Favorable To The Defense 31

1. The "scheme" or plan to lure the victims to Alongi's home..... 31

2. Kamienski's sequestration of a witness 34

3. The wrappings on the bodies 36

C. The Third Circuit Improperly Considered Non-Evidential Material In Reaching Its Decision..... 38

D. The Third Circuit Improperly Shifted The Burden Of Proof To The State 39

E. The Third Circuit Misconstrued The Findings Of The Trial And Appellate Courts 39

CONCLUSION 41

TABLE OF APPENDIX

Opinion of the Third Circuit Court of Appeals, Case 06-4536, filed May 28, 2009.....App. 1

Opinion of the District Court for the District of New Jersey, Civ.A.No. 02-3091, filed July 26, 2006 .....App. 32

TABLE OF CONTENTS – Continued

Page

Opinion of the Superior Court of New Jersey Appellate Division, 603 A.2d 78 (App.Div.1992) ..... App. 100

Order of Third Circuit Court of Appeals denying Petition for Rehearing, Case 06-4536, filed July 2, 2009 ..... App. 156

28 U.S.C. §2254 State Custody, Remedies in Federal Courts ..... App. 158

Cases Demonstrating Conflict Among Circuits Relating to Point II of Petition ..... App. 162

Petitioner's Excerpts of Record (PER) ..... App. 164

TABLE OF AUTHORITIES

Page

CASES

Brecht v. Abrahamson, 507 U.S. 619 (1993).....16

Brown v. Allen, 344 U.S. 443 (1953).....26

Brown v. Farwell, 525 F.3d 787 (9th Cir. 2008).....16

County Court of Ulster County, N. Y. v. Allen, 442 U.S. 140 (1979).....30

Holland v. United States, 348 U.S. 121 (1955).....22

Jackson v. Virginia, 443 U.S. 307 (1979).....*passim*

Leary v. United States, 395 U.S. 6 (1969).....30

Lockyer v. Andrade, 538 U.S. 63 (2003).....20

McDaniel v. Brown, 129 S.Ct. 1038 (2009).....17

Miller-el v. Cockrell, 537 U.S. 322 (2003).....18, 19

Miranda v. Arizona, 384 U.S. 436 (1966).....22

Policano v. Herbert, 453 F.3d 79 (2d Cir. 2006).....22

Tibbs v. Florida, 457 U.S. 31 (1982).....16

United States v. Ortegna Rena, 148 F.3d 540 (5th Cir. 1998).....29

Wainwright v. Sykes, 433 U.S. 72 (1977).....26

Williams v. Taylor, 529 U.S. 362 (2000).....18, 20, 27

Wright v. West, 505 U.S. 277 (1992).....15, 23, 26

Yarborough v. Alvarado, 541 U.S. 652 (2004).....20, 22

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

28 U.S.C. §1254 1

28 U.S.C. §2254 .....*passim*

OTHER

Ides, Allen, "Habeas Standards of Review Under 28 U.S.C. Sect. 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent." 60 *Wash. & Lee L. Rev.* 677 (2003).....21

OPINIONS BELOW

The U.S. Court of Appeals for the Third Circuit did not publish its opinion (Appendix 1) or its order denying the State's petition for rehearing (Appendix 156).

The District Court for the District of New Jersey did not publish its opinion (Appendix 32).

The decision of the Superior Court of New Jersey is reported at 603 A.2d 78, (App. Div.), *certif. denied*, 611 A.2d 656 (1992) (Appendix 100).

JURISDICTION

The Third Circuit filed its decision on May 28, 2009, and denied petitioner's motion for rehearing on July 2, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the circuit court's decision on a writ of certiorari. *This Court has already granted certiorari in a case with a similar issue, which is scheduled for oral argument on October 13, 2009.*[1]

[1] In *McDaniel v. Brown*, Docket No. 08-559, the first question presented was, "What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)?"

STATUTORY PROVISION INVOLVED

28 U.S.C. §2254

(State Custody, Remedies in Federal Courts)

See Appendix 158 for full text.

STATEMENT OF THE CASE

Extraordinary relief was granted to Paul Kamienski in this case, whose 21-year-old robbery and double murder convictions were overturned by the Court of Appeals for the Third Circuit based on its finding of insufficient evidence. That ruling reversed the denial of Kamienski's petition for a writ of habeas corpus by the District Court for the District of New Jersey brought under 28 U.S.C. §2254(a), and renders the State unable to retry him.

The state appellate court, applying *Jackson v. Virginia*, 443 U.S. 307 (1979), found that evidence of Kamienski's activities before, during and after the robbery/murders was sufficient for any rational juror to find him guilty under an accomplice theory. The court found that Kamienski was at the scene of the robbery/murders, that he had isolated his live-in girlfriend beforehand so she would not witness the crimes, that he and his co-defendants had lured the victims to a private place so the crimes would not be detected, that he had helped dispose of the victims' bodies, that he was rewarded for his participation with free cocaine, and that he had threatened his

girlfriend with harm if she revealed her knowledge of the crimes. (App.135-139)

Conversely, and in contravention of the law, the Third Circuit acknowledged Kamienski's presence at the scene of the crimes and the isolation of his girlfriend beforehand, but found that he might have isolated her because he was about to consummate his largest drug deal ever – despite no evidence in that regard – and that his disposal of the bodies and receipt of free cocaine it labeled as "gifts" held no evidential significance to whether he was complicit in the robbery or murders. (App.27,29) The Third Circuit also ignored the state court's finding that the victims were lured to the private spot where they were robbed and murdered, and that Kamienski had threatened his girlfriend subsequent to the crimes so that she would not report them.

Petitioners rely upon the recitation of facts by the district court and the appellate court on direct review (App.109-114,132-138), but provide below important details from the record to substantiate the courts' findings, to demonstrate the errors of the Third Circuit, and to provide a framework to this Court for the arguments that follow.

In November 1988, Paul Kamienski was convicted of conspiracy to possess cocaine with intent to distribute, aiding and abetting first-degree murder, and felony murder, in connection with the robbery

and shooting deaths of Henry ("Nick") and Barbara DeTournay[2] in Ocean County, New Jersey, on September 19, 1983.[3] Kamienski was acquitted of conspiracy to commit robbery and murder, possibly influenced by the prosecutor's statements in summation that he did not think the evidence proved that Kamienski had conspired with his co-defendants to kill the DeTournays. That moment of unscripted candor in an 18-day trial played a large but inappropriate role in the disposition of this case by the Court of Appeals.

Kamienski brokered the sale of three kilos of cocaine between sellers Henry and Barbara DeTournay from Florida and buyers Anthony Alongi and Joseph Marsieno from New Jersey, for which the DeTournays expected to realize enough profit to be "set for life." (App.112) Kamienski knew the sellers and buyers socially, and he brought them together in September 1983 when the DeTournays told him they wanted to sell large quantities of cocaine on a recurring basis in Ocean County. Kamienski vouched for each party to the other. Henry DeTournay had long red hair and a big bushy red beard, and looked like a "hippie." (App.132-133)

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[2] Henry DeTournay is referred to herein as Henry unless identified as "Nick" within a quoted passage.

[3] Also tried and convicted with Kamienski were Anthony Alongi and Joseph Marsieno (a/k/a Marzeno and Marseno). Alongi's appeal from the denial of habeas corpus relief is pending in the Third Circuit Court of Appeals; Marsieno died while his direct appeal was pending.

The drug transaction did not go according to plan for the DeTournays, because instead of being paid, they were robbed of their cocaine, shot multiple times and dumped in Barnegat Bay. The State's theory at trial was that Kamienski's actions before, during and after the crimes proved his guilt as an accomplice to robbery and murder. (App.101,109-110)

When at the Jersey shore, Kamienski lived with his girlfriend Donna Duckworth on his boat, the Foreplay III, which was kept at the Ocean Beach Marina in Lavallette, where the DeTournays also docked their boat when visiting the state. Alongi and Marsieno each lived within several miles of the marina. (App.110-111)

After meetings between the participants around Labor Day in 1983, September 18 was set as the date for the deal. At 6:00 p.m. that night, Kamienski met with Marsieno and Alongi at the Toms River Holiday Inn, where the DeTournays' drug courier Sidney Jeffrey had a room and where the exchange originally was to occur. Marsieno, who did not drive, had arranged earlier to have his friend Jean Yurcisin pick him up exactly at 8:00 p.m. at the Holiday Inn, and told her not to be a minute late, because he would "be carrying." When Marsieno entered Yurcisin's car at 8:00 p.m., with a briefcase, he cursed "those lousy MF'ers" who "wanted to see the money first," referring to Henry's failure to bring the drugs to the initial meeting. Marsieno said that he had no intention of paying them and that he would kill them before they got his money. Back at Marsieno's condo,

Yurcisin saw him open his briefcase. In it was a gun, but no money. (App.7,111,113,134-135)

When Henry failed to bring the drugs to the first meeting, he was told that the buyers were "having trouble" getting the money together, and the deal would go down the next day. Significantly, its location was changed from the Holiday Inn, a public place, to the private residence of Anthony Alongi – a water-front house with a boat at the dock. The new plan contemplated that Henry would count the money while Barbara waited at the Holiday Inn with the cocaine, and she would then be picked up to bring the drugs to the transaction once Henry was satisfied there would be payment in full. (App.135-136)

On September 19, Kamienski told Duckworth that he was taking her to spend the day with her girlfriend Janet O'Donnell in Seaside Heights. Duck-worth was surprised and pleased, because she and Kamienski were never apart. Also unusual that day was that Kamienski drove his car, although his li-cense was suspended and he never drove in 1983. Kamienski dropped off Duckworth "only 30 minutes before the drug deal was to be finalized," and picked her up about five hours later. (App.136)

Sometime between 3:00-6:00 p.m. on September 19, Alongi's neighbor George Hunt saw a man with long red hair and a big red beard exit a car with Florida plates and walk toward Alongi's front door. Alongi came out from the back of the property to

greet the man – later identified as Henry DeTournay – and they both went behind the house. (App.8)

At the Holiday Inn around that same time, Barbara DeTournay was in Sidney Jeffrey's room with the kilos of cocaine packed in a green nylon bag, waiting to be picked up after Henry was supposedly done counting the money. She later left Jeffrey's room with the cocaine, entered a car fitting the description of Alongi's, and traveled east, in the direction of Alongi's house. (App.136)

Duckworth stayed with O'Donnell on September 19 from the time she was dropped off in the afternoon until Kamienski picked her up around dusk and drove her to Alongi's house. Kamienski told Duckworth to "wait here" in Alongi's kitchen with his girlfriend Jackie Sullivan. When Sullivan took a phone call, Duckworth went outside looking for Kamienski. She found him on the dock facing the boat and saw Alongi on the boat with what looked like a body in a blue sleeping bag. Duckworth also spotted a brown blanket covering something else, and the entire area was wet, as if it had been hosed down. When Alongi saw Duckworth he lunged for her, but Kamienski stopped him by saying, "She's all right." (App.136-137)

Duckworth ran into the house and into the bathroom, with Kamienski and Alongi following her. Sullivan suggested that she and Duckworth go out for a while, and when they returned, Duckworth saw that Marsieno was also at Alongi's house. Alongi took

Duckworth by the arm upstairs to a bedroom, showed her a phone with the words "hit man" on it, then displayed a gun and told her if she didn't keep her mouth shut, she'd end up like her friends and that Kamienski would not be able to save her. (App.141)

While driving back to the boat that night, Kamienski told Duckworth that he couldn't control what happened, that "Nick went first and Barbara didn't suffer," and that if they didn't keep their mouths shut, he would not be able to save them. As they boarded the boat, Duckworth noticed that Kamienski's teak box was missing from the dock. In that box Kamienski kept rags and towels and other boating-type supplies. Duckworth usually stepped on the teak box to stabilize her entry into the boat, because it was too high for her. That night she also noticed that the boat was difficult to board because it was "moved forward." (App.9,43,137-138) The next day, the Foreplay III was removed from the Ocean Beach Marina for repairs. (App.201-202)

On Saturday, September 24, Henry DeTournay's body was discovered afloat in Barnegat Bay, wrapped in a blue sleeping bag and a rust-colored blanket, tied with white rope and tethered to cement blocks. Enclosed in the bag and blanket with the body was a blue rose-patterned towel. Henry's wallet contained a business card of Kamienski with handwritten notations of apartment, beeper and boat numbers for "Paul" and/or "Donna," plus handwritten directions to, and a phone number for, Alongi's house. (App.34,109-110)

Around dinnertime that day, Duckworth and Kamienski were at the Top O'the Mast Restaurant when police came looking for Kamienski. Before talking to them, Kamienski instructed Duckworth to call Alongi, who appeared at the restaurant within minutes. (App.43) Yurcisin was working at the Top O'the Mast that night, and Alongi asked her if she had seen Marsieno. When she said no, Alongi replied that the police had "found a body" and it was very important for Marsieno to get in touch with him. (App.45)

The police told Kamienski that his business card had been found on a man's body recovered from Barnegat Bay. (App.34,132) Later that night, Kamienski saw Arthur ("Buddy") Lehman, an acquaintance of this social group and a heavy cocaine user, who had been told by Marsieno that he would have some kilo-quality coke on the 18th. (App.135) Kamienski told Lehman that his "friends" from Florida had been murdered, although Barbara DeTournay's body was not recovered until the following day. She also was wrapped in a rust-colored blanket tied with white ropes. (App.10,109)

On or about October 1, Kamienski, Alongi, and Marsieno dined at the Top O'the Mast with Duckworth and Sullivan, while Yurcisin was waitressing. Alongi and Marsieno discussed bodies being found, and Marsieno remarked that "it was easy" and "they were like scared puppies." (App.43) Alongi complained about not getting "his share," and Marsieno replied that was because the job was not done right,

that the bodies would never have surfaced had they been properly weighed down. Later that night in Marsieno's condo, Yurcisin glimpsed three blocks of cocaine wrapped in plastic contained inside a green flight bag, with one bag opened and half empty. (App.166-168)

Starting about that same time, high quality cocaine flowed abundantly in Ocean County, New Jersey. (App.44,138) During the first week of October, Lehman saw Sullivan in Atlantic City where her coat was "loaded with bags of cocaine," broken up into ounce-sized bags. (App.165-166) Throughout October and November, Marsieno doled out ounce-sized bags of cocaine to Kamienski and Alongi, without charging them. (App.10)

In late November or early December 1983, while Yurcisin and Marsieno were traveling to Atlantic City and snorting cocaine, he told Yurcisin about "the biggest drug deal that he ever made, with a long-haired, red-bearded hippie," who didn't look like he could be trusted and who failed to bring the drugs to the original meeting, wanting to see the money first. The second time, the hippie brought the drugs. Marsieno had never intended to pay for the drugs, but felt he had to teach the hippie a lesson, so he choked him, brought him to his knees, then shot him dead. Marsieno threatened Yurcisin and her daughter

with death if she ever repeated his confession.[4] (App.170-171)

At trial, Duckworth was shown a towel with a blue floral pattern that had been found with Henry DeTournay's body. She identified it as a towel that came from Kamienski's teak box that had been adjacent to the Foreplay III until the day of the murders. She also identified the two rust-colored blankets with satin borders found wrapped around the DeTournays' bodies as looking "like blankets off the Foreplay." (App.44) There were numerous blankets on Kamienski's boat, which slept eight, plus spare blankets kept in the boat's storage compartments, all brown or earth-colored with satin borders. Additionally, Duckworth testified that the knots securing the bodies in their wrappings were hitch-knots, which Kamienski typically used when boating. (App.44,137)

At trial Kamienski flatly denied any involvement in the robbery and homicides, and even in the planning of the drug transaction. He denied introducing the DeTournays to Alongi to arrange a cocaine deal, but admitted that he and Duckworth were drug

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[4] The court instructed the jury that this testimony was admissible as to Marsieno only; but the instruction did not pertain to his never intending to pay for the drugs because that evidence had been admitted earlier without objection as Yurcisin described Marsieno's remarks when she picked him up at the Holiday Inn on September 18 and he lamented the failed drug exchange caused by the seller not bringing the drugs.

users and that he had purchased drugs from Henry and Lehman, with Duckworth having witnessed some of those deals. (App.174-177)

He acknowledged taking the DeTournays in his boat to Alongi's house around Labor Day 1983, but claimed not to have heard or participated in any conversation about a drug deal while there that day, and he denied vouching for anybody to anybody. (App.175-178)

Kamienski testified that after Labor Day weekend 1983, he never again saw Barbara or Henry DeTournay. (App.181) He claimed also that he was not at the Holiday Inn on the 18th, the original scheduled date for the deal. (App.182-183) He stated that he never took Duckworth to O'Donnell's house on the 19th and that he was never at Alongi's house on the 19th, with or without Duckworth. Thus, he neither saw nor helped dispose of any dead bodies, and the blankets that were found around the bodies were not from his boat. (App.184,186-188)

Kamienski admitted to owning the teak box, but claimed it had been lost in a squall. He also said he never kept any rags or towels in it, just ropes and wax. He denied that the blue floral towel – found inside the wrappings around Henry's body and identified as his by Duckworth at trial – was ever in his teak box. (App.190-192)

Kamienski also denied being at the Top O'the Mast on October 1, as testified to by Duckworth and Yurcisin; thus, he could not have heard the

conversation at the table about the murders. He also said he did not tie hitch-knots, in general and specifically on the DeTournays' bodies. He never planned to rob the DeTournays because he had all the money he needed, he could get as much money as he wanted, and he never got any cocaine from Marsieno or Alongi in the fall of 1983. (App.192-195,197) He testified that the water in Barnegat Bay where the bodies were found was much too shallow for his big boat to pass, but was forced to concede that he had to go through that very area to reach Alongi's lagoon-front house, which he admittedly did at least once, with the DeTournays onboard. (App.179-180,199-200)

Kamienski denied almost 100% of the State's proofs against him, compelling a studied scrutiny of his honesty by the jury. Kamienski was the only defendant to testify, a crucial point when determining whether sufficient evidence existed to convict someone who put his credibility on the line before twelve jurors. While reviewing courts have seen only Kamienski's words, those jurors observed his countenance, his demeanor, his gestures, his angst or composure, his arrogance or humility, his directness or evasiveness. Those perceptions likely played an enormous role in the jury's conclusion that the evidence was sufficient to prove Kamienski guilty, particularly because his blanket denials – if disbelieved by them – could properly have been considered as substantive proof of his guilt.

The trial court granted judgments of acquittal notwithstanding the verdicts in favor of Kamienski

and Alongi for the two murders and felony murders, based on its erroneous legal conclusion that (1) there was an error in the jury charge that required a new trial, but (2) there was insufficient evidence to support convictions on those counts because the acquittals on the conspiracy counts made the evidence relative to conspiracy inadmissible as to the other counts on retrial.

On the State's appeal, the appellate division held, "even though the jury found that the State failed to prove a conspiracy to rob or to murder, much of the evidence presented to establish such a conspiracy was also relevant to establish Alongi's and Kamienski's guilt as accomplices to Marsieno in the commission of the substantive offenses of murders and felony murders." (App.126-127) The appellate division reversed the trial court's granting of judgment n.o.v. and reinstated the convictions. Of that decision the Third Circuit later said not only that it was erroneous, but that the appellate division had "conflated proof [of Kamienski's brokering a drug transaction] into its inquiry into evidence of murder and felony murder," rendering the decision unreasonable. (App.30-31)

Notwithstanding its holding, the Third Circuit determined that Kamienski was present at the scene of the robbery and murders, was undoubtedly involved in brokering the cocaine deal and vouching for the parties, and that he helped dispose of the DeTournays' bodies to cover up their murders, despite his denials. The Court found that Kamienski did attend the September 18th meeting at the

Holiday Inn with Alongi and Marsieno, which was the original date for the drug deal, and which he also denied. Finally, the Court concluded that Kamienski received cocaine from Marsieno after the murders, at no charge, again notwithstanding his denials. (App.20-21,24-25) Despite these four declarations that Kamienski had lied under oath, the Third Circuit still held that the jury could not properly have found the required elements of the charges from the proofs presented by the State, and from Kamienski's other denials as recited above. *Cf.*, *Wright v. West*, 505 U.S. 277, 296 (1992).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD CLARIFY, EXPOUND UPON, AND OTHERWISE GIVE MEANING TO THE "UNREASONABLE APPLICATION" CLAUSE OF 28 U.S.C. §2254(d)(1) IN A SUFFICIENCY-OF-EVIDENCE CLAIM.

Petitioners present the narrow question of what is the proper standard of review under the "unreasonable application" clause of 28 U.S.C. §2254(d)(1) in a sufficiency-of-evidence habeas claim. This case was decided entirely under that subsection, as the Third Circuit explicitly declined to address the issue under §2254(d)(2) and (e)(1).

The different functions of and societal interests served by direct versus collateral review are well

established. One such interest at stake is "the State's interest in the finality of convictions that have survived direct review within the State court system." *Brecht v. Abrahamson*, 507 U.S. 619, 633-35 (1993). A claim for habeas relief is not an opportunity to "relitigate State trials." Rather, relief is limited to extreme malfunctions or grievous wrongs in the state courts. *Id.* at 633-35.

A sufficiency-of-evidence habeas claim differs from other habeas claims in two significant ways. First, in non-sufficiency claims, the prospect of retrial involves the usual significant "social costs," *id.* at 647, but the grant of habeas relief on a sufficiency-of-evidence claim imposes the greatest of social costs because double jeopardy bars retrial. *Tibbs v. Florida*, 457 U.S. 31, 41, 45 (1982). Thus, while the grant of habeas relief on a sufficiency-of-evidence claim is extremely rare, the social cost when it does occur is extremely high.

Second, and more importantly, sufficiency-of-evidence claims on direct review involve the application of the most general legal standards to the most fact-sensitive issues. These types of claims require fine-tuned judgments by courts sitting in direct review, where the question of the scope and operation of the "unreasonable application" clause – essentially the quantum of deference to be given to the state court on collateral review – is most acute.

This Court granted certiorari in *Brown v. Farwell*, 525 F.3d 787 (9th Cir. 2008), *cert. granted*

sub nom., *McDaniel v. Brown,* 129 S.Ct. 1038 (2009), to consider the contours of the standard of review under the AEDPA, 28 U.S.C. §2254(d), specifically (d)(1). That case has been briefed and is pending oral argument.

The question as to whether any state court's opinion constitutes an unreasonable application under §2254(d)(1) is not resolvable in a sufficiency-of-evidence claim in the absence of clear standards. The radical contrast between the opinions of the state appellate court and the federal appellate court at issue here illustrates the problem.

A. The Allocation Of Burdens Under §2254(d) Gives Meaning To The Unreasonable Application Clause Of Subsection (d)(1) And Indicates That *Jackson v. Virginia* Need Not And Should Not Be Applied By A Federal Habeas Court.

This case was decided solely under the "unreasonable application" clause of §2254(d)(1), which places no burden on the State to relitigate the facts of its case in a federal habeas court. That subsection does not invite – or allow – a federal court to review the record below and examine the propriety of the state court's findings of fact, thus eliminating the role of *Jackson v. Virginia* when a federal habeas court performs this very specific type of collateral review under (d)(1).

Conversely, a claim involving factual issues may be asserted under §2254(d)(2). Such a claim is constrained by §2254(e)(1), which allocates a clear burden to the prisoner by providing that, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1).

> A federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system. Where 28 U.S.C. §2254 applies, our habeas jurisprudence embodies this deference. *Miller-el v. Cockrell*, 537 U.S. 322, 340 (2003).

Subsections 2254(d)(2) and (e)(1) as discussed in *Cockrell* would be entirely superfluous if subsection (d)(1) also permitted inquiry into the basic facts of a case as conditionally permitted under (d)(2), unfettered by the burden allocated to the applicant under (e)(1). Were the rule otherwise, and if challenges to the record were permitted under subsection (d)(1), the statutorily-allocated burden now placed on the prisoner regarding factual issues would shift to the State to "relitigate" the case and, as happened here, to prove that the evidence adduced at trial met the reasonable-doubt standard. But federal habeas actions are not meant to be retrials and do not impose any burden on the state under the code or the common law. *Williams v. Taylor*, 529 U.S. 362, 375-90

(2000). Instead, subsection (d)(1) exemplifies the customary and intended deference to a factfinder as well as to the state court that analyzed the record on direct review.

Thus, under subsection (d)(1), a federal habeas court may not disturb the facts as established by the state court's direct review. Factual issues are only challengeable under the constraints of subsections (d)(2) and (e)(1), and then with the burden placed squarely upon the prisoner.

The Third Circuit's relitigation of the facts and inferences in this case under subsection (d)(1), with the State as the burdened party,[5] was contrary to the purpose for which the AEDPA was enacted, i.e., to place "more, rather than fewer, limits on the power of federal courts to grant writs of habeas corpus to state prisoners." *Miller-el v. Cockrell*, 537 U.S. 322, 337 (2003).

Although sufficiency questions are inherently fact-bound, under the "unreasonable application" clause of subsection (d)(1) the only issue is a legal one, whether the state court reasonably applied the rule of *Jackson v. Virginia* to the established facts and inferences. The function of the federal court under the (d)(1) reasonableness clause is to determine whether the correct constitutional standard was applied to the established facts, and then to decide whether that

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[5] *See*, Point III D, *infra*.

application was reasonable or rational, i.e., whether the outcome falls within a range of reasonable outcomes.

Notwithstanding the plain language of (d)(1), many courts, including the Third Circuit here, review the record *de novo* to decide if the facts support a conclusion under *Jackson v. Virginia* that any rational trier of fact could determine the elements of a crime beyond a reasonable doubt. Yet, with the enactment of the AEDPA, Congress signaled that a habeas court need only determine whether the state court's decision was an "unreasonable application" of "law" with deference given to the facts as established by the state courts. 28 U.S.C. §2254(d)(1).

This Court's post-AEDPA decisions in *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003), and *Yarborough v. Alvarado,* 541 U.S. 652, 665-66 (2004), illustrate the point that subsection (d)(1) does not contemplate *de novo* inquiry into underlying facts. In those cases, this Court observed, "We cannot grant relief under AEDPA by conducting our own independent inquiry into whether the State court was correct as a *de novo* matter. . . . Relief is available under 2254(d)(1) only if the State court's decision was objectively unreasonable." *Ibid.*, citing *Williams v. Taylor*, 529 U.S. 362 (2000) and *Lockyer v. Andrade*, *supra*, 538 U.S. at 71.

Because the Third Circuit's analysis was flawed in the process and in the result, Petitioners seek a ruling from this Court for future analyses under 28 U.S.C. §2254(d)(1).

B. The Meaning Of The "Unreasonable Application" Clause Depends Upon The Determinacy Of The Legal Rule To Be Applied And Is Ultimately Reasonable If, Where The Rule Is General, The Decision Fits Within A Wide Matrix Of Reasonable Decisions.

An "application" of federal law under subsection (d)(1) is not always rule-bound, with determinate, settled, and defined limits. Where the law allows wide discretion or speaks in terms of degrees or multi-factored tests, application of those tests may require a wide degree of judgment. This is particularly true where the broad nature of the legal principle and the fact-sensitive nature of the problem require a fine-tuned judgment to be made, as in sufficiency claims. *See generally*, *Ides, Allen*, "Habeas Standards of Review Under 28 U.S.C. Sect. 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent." 60 *Wash. & Lee L. Rev.* 677 (2003).

As this Court has observed, the inherent "reasonableness" of the rule application by the state court may depend upon the type of rule being applied:

> Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. *The more general the rule, the more leeway courts have*

> *in reaching outcomes in case-by-case determinations. Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) (emphasis added).

The factual debatability of the *Miranda*[6] issue in *Alvarado* triggered this Court's finding that the state court did not unreasonably apply clearly established federal law. Extending that logic, and in a circumstantial-evidence case such as this being challenged on sufficiency grounds, the principle of factual debatability becomes most acute:

> [C]ircumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more. *Holland v. United States*, 348 U.S. 121, 140 (1955).

Under these principles, sufficiency challenges merit the highest degree of AEDPA deference, especially in a circumstantial-evidence case. The deference "may well be at its highest when a habeas petitioner challenges a state court determination that the record evidence was sufficient to satisfy the state's own definition of a state law crime." *Policano*

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[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

v. Herbert, 453 F.3d 79, 91-92 (2d Cir. 2006) (Raggi, J., dissenting). That is, of course, the exact scenario now presented to this Court.

Because the *Jackson* test is general and already deferential, application of it by a state court will fit within a wide matrix of reasonable decisions. *Id.* at 665. *See also*, *Wright v. West*, 505 U.S. 277 (1992), in which Justice Kennedy in a concurring opinion opined that applications of law to fact depend in part on the nature of the rule. If the rule in question requires a "case-by-case examination of the evidence," then a number of applications are tolerable.

> The rule of *Jackson v. Virginia* . . . is an example. By its very terms it provides a general standard which calls for some examination of the facts. The standard is whether any rational trier of fact could have found guilt beyond a reasonable doubt after a review of all the evidence, so of course there will be variations from case to case. *Wright v. West*, *supra*, 505 U.S. at 308-09 (Kennedy, J., concurring).

Therefore, the conclusions of jurists evaluating a myriad of factual contexts will fall within a wide matrix of decisions that will be reasonable, as was the state court decision in this matter.

II. THIS COURT SHOULD RESOLVE THE CONFLICT WITHIN AND AMONG THE CIRCUITS AS TO WHAT CONSTITUTES AN "UNREASONABLE APPLICATION" OF FEDERAL LAW IN A PETITION FOR HABEAS CORPUS UNDER §2254(d)(1) BASED ON A SUFFICIENCY-OF-EVIDENCE CLAIM.

This Court is presented with an opportunity to clarify a federal habeas court's function when reviewing a sufficiency-of-evidence claim under subsection (d)(1), and, while doing so, to precisely delineate the separate functions of subsections (d)(2) and (e)(1), which have not yet been addressed in a sufficiency claim. Federal appellate courts are producing opinions inconsistent with other circuits and within their own circuits based on conflicting impressions of the proper scope of their review under 28 U.S.C. §2254(d)(1) as compared to §2254(d)(2) and (e)(1), and in light of the pre-AEDPA mandate of *Jackson v. Virginia*.

The First, Fourth, Fifth and Eighth Circuit Courts generally presume the state court's findings of fact to be correct and analyze only its legal application of *Jackson* for reasonableness. (App.162A) The Second, Third and Seventh Circuit Courts review the record evidence independently and apply the *Jackson* standard *de novo*. (App.162B) The Sixth and Ninth Circuit Courts' opinions vary, as they have applied both standards in different cases. (App.162C) The Tenth Circuit admittedly does not know whether

a sufficiency-of-evidence claim under the AEDPA is a question of law or fact, and it has declined to directly address the issue by conducting a *de novo* review of the record. (App.163D) Finally, there are also opinions which vary slightly from those above in which the First, Sixth, Eighth, Ninth and Tenth Circuits have acknowledged the presumption of correctness to factual determinations but nevertheless conduct *de novo* reviews of the record. (App.163E)

The confusion in this area seems to stem from the *Jackson* opinion itself, in which this Court granted certiorari to decide if "a federal habeas corpus court must consider not whether there was *any* evidence to support a state-court conviction, but whether there was sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt." *Jackson*, *supra*, 443 U.S. at 312-13. In then deciding *Jackson*, this Court recognized the deference ordinarily given to state court opinions at that time, but nevertheless acknowledged that federal courts must review the state record when considering a sufficiency-of-evidence claim, to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt. *Id.* at 324.

Justice Stevens disagreed with that standard of review in a concurring opinion, noting that "habeas corpus is not intended as a substitute for appeal, nor as a device for reviewing the merits of guilt determinations at criminal trials." *Id.* at 333, n.5. He regarded the standard as inconsistent with the

prohibition against overturning state court findings of fact. *Id.* at 336, citing *Wainwright v. Sykes*, 433 U.S. 72, 80 (1977).

The standard of review was later debated in *Wright v. West*, 505 U.S. 277 (1992). Justice Thomas, writing for the majority, indicated that the Court "rejected the principle of absolute deference" in *Brown v. Allen*, 344 U.S. 443 (1953). Justice Thomas noted the *Brown* holding that "a district court must determine whether the state-court adjudication 'has resulted in a satisfactory conclusion,'" but never explored "whether a 'satisfactory' conclusion was one that the habeas court considers *correct,* as opposed to merely *reasonable.*" *Wright*, *supra*, 505 U.S. at 287, quoting *Brown*, *supra*, at 463 (emphasis in original). Finally, Justice Thomas observed the Court's continued failure to resolve whether this type of review should be *de novo* or deferential, and noted that "Jackson itself contributed to this trend." *Id.* at 290, citing *Jackson*, *supra*, at 323-26.

Congress attempted to settle these uncertainties when it enacted the AEDPA and completely revised the language of 28 U.S.C. §2254(d), deleting the prior subsection (d) and creating new subsections (d) and (e). Subsection (d)(1) does not allow for an assessment of facts, while (d)(2) permits review of the reasonableness of a state court's findings of fact under the constraints of (e)(1), which places the burden upon the habeas petitioner in such a proceeding. Despite its clear language, however, many courts still review findings of fact under (d)(1), as the Third Circuit did

in this case, thereby usurping the authority of the state courts and the efficacy of the AEDPA.

After enactment of the AEDPA, Justice O'Connor noted in *Williams v. Taylor*, 529 U.S. 362 (2000), that the new statute "modifies the role of federal habeas courts in reviewing petitions filed by state prisoners," and agreed with Justice Stevens that it seeks to "curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Id.* at 404.[7] The Court found that the "contrary to" and "unreasonable application of" clauses require independent analysis, *id.* at 412-13, indicating unquestionably that the proper focus of a federal habeas court is on the application of law, and that an "*unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410.

In summary, the AEDPA changed federal habeas corpus practice so that a habeas court should not apply the *Jackson* standard to a state court adjudication of a sufficiency-of-evidence claim as it did prior to enactment, but should merely review the opinion and determine whether the state court reasonably applied the correct legal standard. Notwithstanding passage of the AEDPA, the circuit courts' methods of analysis now conflict so severely as to prevent the predictability, uniformity and finality

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[7] Justice Stevens wrote for the majority in Parts I, III and IV; Justice O'Connor in Part II.

that the AEDPA was intended to establish. Thirteen years have passed since 28 U.S.C. §2254 was amended to include section (d)(1), which is now in dire need of clarification. The time has come for this Court to instruct and guide the federal courts to properly analyze a sufficiency-of-evidence claim.

III. THE THIRD CIRCUIT COURT OF APPEALS REVIEWED THE RECORD *DE NOVO*, CONTRARY TO THE AEDPA. EVEN IF SUCH *DE NOVO* REVIEW WERE APPROPRIATE, THE THIRD CIRCUIT PERFORMED IT IMPROPERLY UNDER THE *JACKSON* STANDARD BY DRAWING ITS OWN INFERENCES IN FAVOR OF KAMIENSKI AND REJECTING INFERENCES FOUND BY THE APPELLATE COURT IN FAVOR OF THE STATE.

A. The Third Circuit Applied The Wrong Legal Standards To This Case.

The Court of Appeals erroneously framed the issue, "[w]e are presented with the single claim: whether Kamienski's murder convictions are supported by sufficient evidence. Kamienski's primary argument is that his murder convictions should be vacated under §2254(d)(1) because the "evidence failed to prove all the required *actus reus* or *mens rea* elements of the offenses beyond a reasonable doubt." (App.17)

The court defined its duty to "[v]iew each strand [of evidence] as it is connected to the whole and determine if the totality of evidence, viewed in the light most favorable to the government, establishes guilt beyond a reasonable doubt" (App.29) and concluded, "this record does not contain *evidence that would allow an inference* that Kamienski purposely or knowingly assisted Marsieno in killing the DeTournays." (App.28) (emphasis added).

As stated in Points I and II above, the function of a habeas court is not to determine *de novo* whether the evidence was sufficient, but to determine whether the state court's application was unreasonable.

The Third Circuit reasoned in deciding the sufficiency question, "If the evidence tends to give equal or nearly equal circumstantial support to guilt or innocence . . . reversal is required: When the evidence is essentially in balance, a reasonable jury must necessarily entertain a reasonable doubt," citing *United States v. Ortegna Rena*, 148 F.3d 540, 543 (5th Cir. 1998). (App.27) Even if application of *Jackson* were proper under §2254(d)(1), the Third Circuit's analysis was contrary to that opinion, which held that "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences *must presume* . . . that the trier of fact resolved any such conflicts in favor of the prosecution, and *must defer to that resolution.*" *Jackson v. Virginia*, 443 U.S. at 326 (1979) (emphasis added).

After deciding *de novo* that the appellate division's analysis was erroneous, the Third Circuit leaped to the conclusion that it was therefore unreasonable, with little by way of discussion to support that determination. The court attempted to bolster its conclusion by summarily finding that the state court "unreasonably applied the standard governing when inferences may be relied upon . . . [t]hat standard requires that the inference in question must be more likely than not to flow from the facts already established," citing *Leary v. United States*, 395 U.S. 6, 36 (1969).

However, the "more likely than not" standard from *Leary* applies to mandatory presumptions and has nothing to do with inferences, which are not presumed but must be drawn by the trier of fact. Applying this standard to the "unreasonable application" test decreases rather than increases the deference to be given to a state court decision, an undesirable result under the AEDPA. *See*, *County Court of Ulster County, N. Y. v. Allen*, 442 U.S. 140, 157-60; n.16-17 (1979), where this Court first described the difference between mandatory presumptions and permissive presumptions or inferences and their effect upon the reasonable doubt standard.

Nevertheless, the state court properly applied the *Jackson* standard by giving all inferences in favor of the State and presuming that any conflicts in the inferences were resolved by the jury in favor of the State. Specifically, the state court correctly noted that

"[i]t was up to the jury to determine the meaning and significance of Kamienski's conduct." (App.138)

The Third Circuit not only failed to properly give deference to the state court, but also based its "unreasonable application" finding upon an incorrect legal standard.

B. As Part Of Its *De Novo* Review Of The Record, The Third Circuit Improperly Ignored Inferences Favorable To The State and Found Inferences Favorable To The Defense.

The state appellate court detailed the testimony demonstrating the involvement of Kamienski, Alongi and Marsieno in these murders, from which it acknowledged the inferences in favor of the prosecution. The Third Circuit either ignored those inferences or revised them in favor of Kamienski.

1. The "scheme" or plan to lure the victims to Alongi's home.

The state court recognized a "scheme" of the buyers to lure the victims and their cocaine away from the public Holiday Inn to a more private place. (App.136) This luring was necessary because there never was $150,000 to pay for the three kilos and because the victims had been so careful for their personal safety and that of their property when initially planning the transaction. The state court observed, "Jeffrey and Henry had agreed that Henry

would meet with the buyers first without the cocaine." (App.135)

Thus, on September 18, the first scheduled transaction at the Holiday Inn failed because Henry did not bring the drugs, so "the buyers informed Henry that they were having some difficulties getting the money together." (App.135)

At 6:00 p.m. that evening, Kamienski, Alongi and Marsieno met at the Holiday Inn. Marsieno had a briefcase containing a gun but no money. Of this scenario the state court commented:

> Marzeno said the *sellers wanted to see the money first* but he had no intention of turning over any money to them and that he would kill them before they got any of his money. A reasonable inference can be drawn that Marzeno had planned to rob and maybe kill the DeTournays to obtain the cocaine on the 18th because he had only a gun in the briefcase and because he had promised to obtain the cocaine on the 18th and to sell some to Lehman on the same day. But the Holiday Inn was rather public and Henry did not bring the drugs, so a *scheme was devised to get Henry and Barbara to Alongi's home which was much more isolated.* (App.135-136) (emphasis added).

On the 19th, the exchange was set for 3:00 but postponed to 6:00. The state court described the new plan as one in which Alongi "escorted Henry into his house *under the pretext of counting the money* before

the cocaine was to arrive." (App.140-141) (emphasis added).

The failure of the Third Circuit to address the plan to lure the victims to the scene of the robbery and murders extinguished yet another inference of the premeditative aspect of this case. Equally significant is the court's drawing of an inference in favor of Kamienski on this point. Noting that the victims told Jeffrey that the original drug deal was delayed because the buyers were still getting their money together, that court said:

> To the extent Kamienski was involved in the actual exchange, the evidence only allows an inference that Kamienski believed, like the DeTournays, that Marsieno intended to pay for the cocaine he was to buy the next day. (App.28-29)

While believing that the promise of payment made to the victims as part of the set-up was untrue, the Third Circuit found the only inference to be drawn as to Kamienski was that he too believed the lie. That finding was made despite the Third Circuit's concession that Kamienski brokered the drug deal, despite a reasonable inference to be drawn that the broker of the deal would know the status of the money, and despite his testimony at trial denying any involvement whatsoever in the deal. Indeed, Kamienski denied even being at the Holiday Inn that night; yet the Third Circuit failed to find any inference favorable to the State in light of *his* lie and attached no significance to his untruthfulness under

oath being part of a credibility assessment by the trier of fact. The Third Circuit's finding of this inference in favor of Kamienski was an inappropriate exercise of its review function, and an example of the type of analysis that ran rampant throughout its decision.

2. Kamienski's sequestration of a witness.

The state court recognized the inference that Kamienski sequestered Donna Duckworth from the scene of the robbery and murders:

> The jury could infer that because Kamienski and Duckworth were always together, he needed to be free of her as a potential witness to what was to transpire when the drug deal was finalized. Kamienski was not with Duckworth between 2:30 and 7:30 or 7:45 p.m., at which time Kamienski took her to Alongi's home and told her to stay upstairs in the kitchen. *The jury could have inferred that by prearrangement,* Kamienski took steps to remove a potential eye witness from the scene of a robbery and murder and that his conduct constituted facilitating the commission of the crimes with the required shared intent or purpose. (App.139) (emphasis added).

The Third Circuit did acknowledge, as it must, that Kamienski's prearranged isolation of the witness was because he knew a significant event was about to

occur a short time later. However, it labeled the appellate division's inference as speculative, and found that Kamienski's isolation of Duckworth could not "suggest anything more than his reluctance to have her witness the only major cocaine transaction he was involved in during their relationship (at least there was no evidence of any other large cocaine transaction)." (App.27)

Thus, the Third Circuit improperly rejected the state court's examination and interpretation of the record and drew its own inference against the State and in favor of Kamienski, admittedly on an assumption made without evidential support.

Inferring that the prearranged sequestration of Duckworth was due to the size of this particular drug deal, although the evidence demonstrated that she had witnessed other drug deals, has less support from the record than inferring that it was in anticipation of what actually happened – the robbery and murders.

The State's inference regarding Duckworth's isolation is strengthened by another fact given short shrift by the Third Circuit. Duckworth testified that the floral towel found inside the blanket that was wrapped around Henry DeTournay's body was in fact Kamienski's floral towel from his teak box, and that the blankets looked just like his blankets from the Foreplay III. (App.44) Kamienski's boat was docked several miles away from Alongi's house, yet Duckworth saw those items in Alongi's yard on September 19, giving rise to the inference that Kamienski did not

just happen to appear there after the murders, but had in fact participated in them by bringing supplies to dispose of the bodies. He apparently knew that the location of the deal had been changed, because he showed up at Alongi's house. Kamienski's isolation of Duckworth and his furnishing of materials provide strong proof of premeditation on his part, sufficient to convict him as an accomplice to robbery and murder.

3. The wrappings on the bodies.

The rust-colored blankets with satin borders that wrapped the DeTournays' bodies looked like those from Kamienski's boat, the hitch-knots that secured them were the type that he customarily tied when boating, and the blue floral towel was identified by Duckworth as coming from his teak box. All of that testimony, cited by the state appellate court, permits an inference that Kamienski "lent assistance" to Marsieno and Alongi on September 19. (App.137)

Instead of commenting upon the state court's inference, the Third Circuit attacked what it called the State's "selective reliance" on that evidence and noted that on cross-examination Duckworth acknowledged that she had seen hitch-knots used in other circumstances. The court again ignored an inference from evidence reasonably found by the state court and favorable to the prosecution.

As to the blankets, towel and knots, the Third Circuit found there was "more than sufficient evidence" that Kamienski was involved in disposing of the

bodies and covering up the murders, but did not consider that evidence with regard to his accomplice liability for either the robbery or the murders. (App.22-23) Therefore, it necessarily did *not* view the evidence in the light most favorable to the prosecution.

Viewing all of the direct and circumstantial evidence adduced at trial and considering reasonable inferences flowing therefrom, the state court concluded that the jury reasonably found that Kamienski was part of a conspiracy to obtain drugs from the DeTournays and that he purposefully lent assistance and aid to Marsieno in the commission of the robbery and murders, even if he did not originally conspire to rob or murder them. (App.138)

Regarding the inferences as a whole, the state court indicated, "It was up to the jury to determine the meaning and significance of Kamienski's conduct. His intent or purpose can be inferred from all that Kamienski did and/or said *before, during and after* the robbery." (App.138-139) (emphasis added). While a true statement of the law, that seminal philosophy was disregarded by the Court of Appeals to overturn the lower state and federal courts and reverse a 21-year-old conviction.

The Third Circuit branded the state court's opinion as not only incorrect but unreasonable, for allegedly "conflating" proof of the drug deal into proof of the robbery and murders. (App.30) In sharp contrast to the state courts' view of the evidence and the

reasonable inferences it allows, the Third Circuit analyzed those same factors to reach a very different result by improperly ascribing other possible meanings to the evidence and motives to the parties.

C. The Third Circuit Improperly Considered Non-Evidential Material In Reaching Its Decision.

The Third Circuit inappropriately emphasized the prosecutor's comments in summation, reproducing them no fewer than three times in its opinion yet claiming they played no part in its determination. (App.12-13,23-24,29-30) The Third Circuit noted twice that the prosecutor conceded at the motion for judgment n.o.v. that there was nothing suggesting that Kamienski conspired to commit a robbery or a murder before September 19, but the court failed to also note that that concession went only to the conspiracy charges and not to the accomplice liability for which Kamienski was found guilty. (App.14,24-25,125)

As the trial court instructed the jury several times during the proceedings, the remarks of counsel do not constitute evidence; yet the Third Circuit used the prosecutor's remarks to bolster its otherwise unsupported view of the alleged insufficiency of the evidence.

D. The Third Circuit Improperly Shifted The Burden Of Proof To The State.

Just prior to oral argument, the Third Circuit demanded that the State submit a supplemental brief to "identify evidence" from the 5,000-page record that would allow a reasonable jury to find Kamienski guilty beyond a reasonable doubt. (App.23,26) Yet, when shown such proof, the Court refused to apply inferences to evidence of the drug deal to prove either of the other crimes, instead segregating the evidence of each crime from the others as if there were no connection whatsoever among this chain of events. The shifting of the burden to the State was improper and contributed to the Third Circuit's reaching an incorrect result. This improper positioning of the parties in a habeas claim under §2254(d)(1) illustrates that the Third Circuit reviewed the evidence as if it were the jury instead of reviewing the state court's opinion under the standards of the AEDPA.

E. The Third Circuit Misconstrued The Findings Of The State Trial And Appellate Courts.

The Third Circuit misconstrued the holding of the trial court when it said, "[t]he trial judge who saw all of the witnesses and heard their testimony agreed that the government had not proven either charge beyond a reasonable doubt," and further accused the state appellate court of incorrectly believing that

the acquittal was based on inconsistent verdicts. (App.25,15-16,n.11)

To the contrary, in its opinion the state appellate court quoted the trial court's statement that, "While . . . all the conduct of [defendant] before the afternoon of the 19th is consistent with accomplice liability and the requisite purpose to promote or facilitate the crimes of robbery and murder, the verdict acquitting them of conspiracy to rob or to murder renders this theory untenable." (App.129) Thus, the trial judge did, in fact, agree that the evidence was sufficient, but wrongfully determined that the evidence of Kamienski's conduct before the murders could not be considered as part of the sufficiency claim because of the acquittal on the conspiracy charge.

CONCLUSION

Federal courts need guidance regarding their precise role in reviewing a sufficiency-of-evidence habeas claim under 28 U.S.C. §2254(d)(1). Absent guidance, the decision of the Third Circuit was flawed in that it employed an incorrect standard of review, resulting in a misinterpretation of the state appellate court's direct review, and culminating in the improper reversal of Kamienski's conviction with the grant of the writ of habeas corpus. Accordingly, Petitioners urge the Court to grant this petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Dated: September 29, 2009

Respectfully submitted,

MARLENE LYNCH FORD
Ocean County Prosecutor
By: SAMUEL J. MARZARELLA
Counsel of Record
ROBERTA DIBIASE
WILLIAM KYLE MEIGHAN
Attorneys for Petitioners

APPENDIX CONTENTS

Page

POINT II
CASES DEMONSTRATING CONFLICT AMONG CIRCUITS AS TO STANDARD OF REVIEW UNDER 28 U.S.C. § 2254(d)(1)

A. *First, Fourth, Fifth & Eighth Circuits*.....

Kater v. Maloney, 459 F.3d 56, 67-68 (1st Cir. 2006).....

Williams v. Ozmint, 494 F.3d 478, 489 (4th Cir. 2007).....

Martinez v. Johnson, 255 F.3d 229, 243-244 (5th Cir. 2001).....

Skillicorn v. Luebbers, 475 F.3d 965, 977-978 (8th Cir. 2007).....

B. *Second, Third & Seventh Circuits*.....

Policano v. Herbert, 507 F.3d 111, 116 (2nd Cir. 2007).....

Robertson v. Klenn, ___ F.3d ___, 2009 WL 2634609 (3rd Cir. 2009).....

Johnson v. Bett, 349 F.3d 1030, 1034 (7th Cir. 2003).....

C. *Sixth & Ninth Circuits*.....

Tinsley v. Million, 399 F.3d 796, 814 (6th Cir. 2005).....

Brown v. Palmer, 441 F.3d 347, 350-351 (6th Cir. 2006).....

APPENDIX CONTENTS – Continued

Page

Goldyn v. Hayes, 444 F.3d 1062, 1065 (9th Cir. 2006) .....

Garcia v. Carey, 395 F.3d 1099, 1102-1106 (9th Cir. 2005).....

D. *Tenth Circuit* .....

Torres v. Mullin, 317 F.3d 1145, 1151-1156 (10th Cir. 2003).....

Webber v. Scott, 390 F.3d 1169, 1178-1179 (10th Cir. 2004).....

E. *First, Sixth, Eighth, Ninth & Tenth Circuits*.....

Hurtado v. Tucker, 245 F.3d 7, 18 (1st Cir. 2001).....

Saxton v. Sheets, 547 F.3d 597, 601-607 (6th Cir. 2008).....

Sera v. Norris, 400 F.3d 538, 543-548 (8th Cir. 2005) .....

Bruce v. Terhune, 376 F.3d 950, 957-958 (9th Cir. 2004).....

Boltz v. Mullin, 415 F.3d 1215, 1230 (10th Cir. 2005) .....

2009 WL 1477235

United States Court of Appeals,
Third Circuit.
Paul KAMIENSKI, Appellant
v.
Roy L. HENDRICKS, Administrator;
Attorney General of the State of New Jersey;
Ocean County Prosecutor's Office.
No. 06-4536.

Argued April 16, 2009.
Filed May 28, 2009.

On Appeal from the United States District Court for the District of New Jersey (D.C. No. 02-cv-03091), District Judge: Stanley R. Chesler.

Timothy J. McInnis, Esq. (Argued), Law Office of Timothy J. McInnis, New York, NY, for the Appellant.

Samuel J. Marzarella, Esq. (argued), Marlene Lynch Ford, Prosecutor of Ocean County New Jersey, Toms River, NJ, for Appellees.

Before McKEE, SMITH, and VAN ANTWERPEN, Circuit Judges.

OPINION OF THE COURT

McKee, Circuit Judge.

Paul Kamienski appeals from the final order of the United States District Court for the District of New Jersey denying his petition for a writ of habeas corpus. In that petition, Kamienski challenged the

sufficiency of the evidence to support his 1987 conviction for murder and felony murder in New Jersey state court. The sole question certified to us on appeal from the order denying habeas relief is whether the evidence was sufficient to prove Kamienski guilty of first degree murder and felony murder beyond a reasonable doubt. Based upon our careful review of the record, and despite the very deferential standard that limits our inquiry, we believe that no reasonable juror could conclude that the evidence admitted against Kamienski at his trial established that he was guilty of murder or felony murder beyond a reasonable doubt, and the New Jersey courts' conclusion to the contrary is an unreasonable application of clearly established Supreme Court precedent. Accordingly, as we shall explain below, we hold that the district court erred in denying Kamienski's petition, and we will therefore remand to the district court with instructions to grant relief.[1]

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[1] We have appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253.

I. Factual Background[2]

On September 24, 1983, the body of Henry "Nick" DeTournay was recovered from the waters of Barnegat Bay in New Jersey. The body was wrapped in a blanket and a sleeping bag and tied to a cement block, and Kamienski's business card was found in one of Nick's pockets. Writing on the back of that card referred to an apartment phone number and a "boat" phone number for "Paul and Donna." The following day, Barbara DeTournay's body was found in the bay wrapped in a brown blanket not far from where Nick's body had been recovered. Subsequent investigation established that both Nick and Barbara DeTournay had been killed by multiple gun shot wounds inflicted several days before their bodies were discovered.

The ensuing investigation by the Ocean County Prosecutor's office eventually focused on Paul Kamienski, Anthony Alongi and Joseph Marsieno.[3] Investigators developed the theory that the DeTournays had been killed in the course of a large drug deal. However, investigators were not able to

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[2] Since the only issue before us is the sufficiency of the evidence, we must set forth the evidence that was developed at trial in some detail. We must state the facts in the light most favorable to the government, and draw all reasonable inferences from those facts in the government's favor.

[3] Joseph Marsieno is also referred to as "Marzeno" and "Marseno" in various places in the record. Like the district court, we shall refer to him as "Marsieno."

formally charge anyone for the murders until October of 1987 when Kamienski, Alongi, and Marsieno were charged with robbery, murder and conspiracy to distribute the cocaine that the DeTournays had been trying to sell.

Thereafter, the three defendants were tried jointly. Donna Duckworth, who was Kamienski's girlfriend from 1981 to 1987, was the main witness against Kamienski. Kamienski and Duckworth "partied" regularly and frequently shared cocaine. Duckworth and Kamienski met the DeTournays in the summer of 1982 when the DeTournays docked their boat at the New Jersey marina where Kamienski kept his boat. In 1983, Nick DeTournay visited Kamienski on his boat a few days before Labor Day to inquire if Kamienski knew anyone interested in purchasing a large quantity of cocaine, and Kamienski stated that he did. During the summer of 1983, Kamienski was buying the cocaine he and Duckworth used from Marsieno and Alongi, whom they had met previously.

During a Labor Day weekend party, Kamienski took the DeTournays to Alongi's home and introduced them to Alongi. During that meeting Kamienski vouched for Alongi to the DeTournays, and he also vouched for the DeTournays to Alongi.

Christine Longo, Barbara DeTournay's sister, testified that Barbara DeTournay had told her that she (Barbara) had spent time during the Labor Day weekend on the boat of a friend named "Paul," who

was a funeral director.[4] Thereafter, Barbara advised Christine that she and her husband were trying to sell some cocaine and that they would "be set for life" because of a cocaine deal they had arranged. Longo did not know how much cocaine was involved, but she could tell that it was a "large quantity."

Duckworth testified that on September 9, a few days after Labor Day, she heard Kamienski telling someone on the phone "he didn't have a scale and to get off the boat." When Duckworth inquired, Kamienski told her that he had been speaking to Nick DeTournay. Phone records that were admitted into evidence showed a call from Kamienski to the residence where the DeTournays were staying on September 9, 1983. There is no further indication in the record of communications between Kamienski and the DeTournays between September 9 and September 19, 1983 when the DeTournays were murdered.

Kamienski and Duckworth attended a party at Alongi's house on Saturday, September 17, and there was talk about good quality cocaine becoming available in the very near future. According to Duckworth, Marsieno and Alongi were the ones who spoke of the upcoming deal. "Buddy" Lehman, a user who purchased cocaine from Alongi, also heard Alongi make these statements. Marsieno told his girlfriend,

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[4] It is clear from all of the testimony that the "Paul" that Christine was referring to was Paul Kamienski.

Jeanne Yurcisin, that "he was expecting to get a great deal of cocaine, that it was supposed to be very good, and it was supposed to burn at 88 to 92 percent, and it was coming up from Florida from friends of Paul and Donna's."

Jeffrey Sidney was the associate of the DeTournays' responsible for driving the cocaine from Florida to New Jersey where he checked in to the Holiday Inn in Toms River. He testified for the prosecution under a grant of immunity. According to Sidney, the drug deal was initially scheduled for Sunday, September 18. On that day, he met Nick in the parking lot of the Holiday Inn at 11:30 a.m., but Nick told him that the "people still weren't ready and they were getting their money together." At 4:00 p.m. on the 18th, Jeanne Yurcisin received a telephone call from Marsieno, in which Marsieno told her to "pick him up at the Holiday Inn" and "to be there at eight o'clock, not to be a minute late, because he would be carrying."

According to Duckworth's testimony, she and Kamienski spent the day of the 18th on Kamienski's boat and then met Alongi, Marsieno and Jackie Sullivan[5] at the bar of the Holiday Inn Hotel for drinks around 6:00. Duckworth could not recall what

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[5] Jackie Sullivan was Alongi's girlfriend in 1983. By the time of the trial, the two had married and Jackie Sullivan became Jackie Alongi. Both names appear in the record and the briefing, but refer to the same person.

the men talked about, as she interacted primarily with Sullivan. However, there was no testimony that anyone at that meeting discussed the pending cocaine transaction. There was also no testimony that Kamienski met with the DeTournays on the 18th or ever told anyone (including Duckworth) about any meeting with the DeTournays on the 18th.

Jeanne Yurcisin, Marsieno's girlfriend, testified that she did pick Marsieno up at 8:00 that evening from the Holiday Inn as instructed and that he was carrying a briefcase. Yurcisin testified: "as we were pulling away, he said, those lousy MF'ers, He said that they wanted to see the money first, and that he – he had no intention of paying them any money, that he would kill them before they got any of his money." Yurcisin also testified that later, at his condo, Marsieno opened the briefcase and that it contained only a gun and no money.

As noted above, the drug deal was postponed from September 18, to Monday, September 19, at 3:00 p.m. according to Sidney, the drug courier. On the 19th, the deal was further delayed until later in the afternoon. At 5:00 p.m. on the 19th, Barbara was dropped off at the Holiday Inn to meet Sidney and collect the cocaine. She told Sidney that instead of Nick coming back with the money, a "distinguished man" would be picking her up. Thereafter, Sidney saw Barbara get into a car matching the description of Alongi's car around 5:00 p.m. Sidney never saw or heard from either of the DeTournays again.

Alongi's neighbor, Mr. Hunt, testified that he saw Nick's car pull into Alongi's driveway and saw Nick get out of the car and shake Alongi's hand sometime between 3:00 and 6:00 p.m. on Monday, September 19.

Duckworth testified that Kamienski drove her to a friend's house and dropped her off there at about 2:30 p.m. on the 19th. She testified that this was unusual because Kamienski's license was suspended and he never drove. Furthermore, the two of them were virtually inseparable during that period as they were always together.

According to Duckworth, Kamienski subsequently picked her up and brought her to the Alongi residence around "dusk," and Kamienski then directed her to wait in the kitchen with Jackie Sullivan. However, Duckworth did not heed his instruction. Rather, she went outside towards the dock where she saw Kamienski "standing by the dock" looking towards Alongi, who was in a boat.[6] She saw a blanket and sleeping bag in the boat and "what appeared . . . to be a body shape in the sleeping bag." The sleeping bag was blue and she also saw a brown blanket in the boat. The dock was wet. Alongi started to lunge at Duckworth when he saw her, but

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[6] Presumably, this was the black marquis boat that belonged to Sullivan's brother which the government believes was used to dump the DeTournays' bodies into the bay.

Kamienski told Alongi that Duckworth was "alright," and she went back inside.

After Duckworth returned to the house, she and Sullivan went to the mall and then to a liquor store. When they returned, Marsieno was also there, and they all shared drinks. According to Duckworth, Alongi took her upstairs and showed her a gun, a phone that said "hitman" on it, and then warned her: "if I didn't be quiet, I'd end up like my friends." Alongi also told Duckworth that "Paul wouldn't be able to save me if I open my mouth. . . ."

When Kamienski and Duckworth left Alongi's house that evening, Duckworth asked Kamienski what happened. Kamienski responded by telling her: "he couldn't control what happened" and added that "Nick went first, Barbara didn't suffer." Kamienski then warned her: "if we didn't shut up that he wouldn't be able to save me or himself." Upon returning to Kamienski's boat, Duckworth noticed that it was harder to board the boat than usual because it had been moved slightly forward in its berth and a box which contained polishing towels and rags had been moved.

Duckworth also testified that cocaine became very plentiful in late September after this incident, and Kamienski was looking for a "grinder" after the

murders.[7] There was also testimony that after the murders, Marsieno would give small amounts of cocaine to both Alongi and Kamienski without asking for payment.

Duckworth also recounted that on October 1, 1983, she, Marsieno, Kamienski, Alongi, Sullivan, and Yurcisin met at a restaurant. There, she heard Marsieno state: "[t]hey were like scared puppies . . . it was easy." When Duckworth exhibited some discomfort, Marsieno told her to "straighten up or [she] could end up like them . . . ".

Duckworth also testified that the day Nick DeTournay's body was found and the police came to question Kamienski, he instructed her to call Alongi. Telephone records show that Kamienski called Alongi 5 times in the 6 days following the discovery of the bodies. Finally, Buddy Lehman – a member of Paul and Donna's social circle – testified that the same day Nick's body was found (but before Barbara's body was recovered), Kamienski told him: "[M]y *friends* from Florida have been murdered." (Emphasis added).

Duckworth's testimony included the fact that the blankets the DeTournay's bodies were wrapped in when discovered were similar to blankets that she had seen on Kamienski's boat. She also stated that a towel that was found with the bodies resembled one

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[7] According to Duckworth's testimony, a "grinder" is an appliance that is used to convert rock cocaine into powder. Sidney testified that the DeTournays' cocaine was in rock form.

she had seen Kamienski use to polish his boat, and she testified on direct that the hitch knots depicted in photos of the recovered bodies that were used to tie the bodies to cement blocks were the "same type of knots that [Kamienski] would tie."[8]

There was more testimony at trial regarding evidence linking Alongi and Marsieno to the crimes, but that evidence was not admitted against Kamienski and has no bearing on Kamienski's appeal.[9]

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[8] The government makes much of this testimony on appeal. *See* State's Br. at 36-37 ("Duckworth had been boating since age five and was familiar with how to secure boats and the knots boaters used to secure them. Kamienski used a peculiar 'hitch' knot to secure a boat, rather than that taught to Duckworth.") However, the state's selective reliance on that testimony is misleading because Duckworth conceded on cross examination that there was nothing unique about the knots, and that the hitch knot is a common boater's knot. When asked if she had seen other people tie knots like the ones used to secure the bodies, she responded that she had in "many circumstances." Accordingly, the fact finder could only conclude from that portion of her testimony that Kamienski knew how to tie a common "hitch knot," used in boating.

[9] In fact, throughout its brief, counsel for the government has used the term "defendants" in a manner that included Kamienski without specifying which of the three defendants the evidence refers to. In several of those references, the evidence being discussed pertained only to Marsieno and/or Alongi, and not to Kamienski. Moreover, the government's brief frequently includes facts based on testimony that was admitted only against Marsieno and/or Alongi. Although counsel does note that such evidence was admitted only against the other defendant(s), it is clearly irrelevant in determining if the evidence admitted

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II. Procedural History

In October, 1987, approximately four years after the killings, a grand jury sitting in Ocean County, New Jersey, returned an indictment against Paul Kamienski, Anthony Alongi, and Joseph Marsieno. The indictment charged each defendant with two counts of first degree murder, one count of felony murder, conspiracy to commit murder and/or robbery, and conspiracy to possess cocaine with the intent to distribute. The prosecution's theory at trial was that Marsieno committed the murders during a drug deal for three kilograms of cocaine and that Alongi and Kamienski were accomplices to the robbery and the murder.

Although it is not determinative of our inquiry into the sufficiency of the evidence supporting Kamienski's convictions for murder, or felony murder, it is nevertheless instructive to note that the prosecutor made the following argument during his closing to the jury:

> Paul Kamienski was there when [the DeTournays] were murdered. Paul Kamienski was there because he put this deal together,

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against Kamienski was sufficient. Moreover, including such evidence in the brief is both unhelpful and misleading as only Kamienski's appeal is before us. Counsel for the government has consistently either misunderstood or ignored the limitations and propriety of including such evidence responding to Kamienski's appeal.

he had brokered it, the DeTournays trusted him. He was the person they trusted.

* * *

Am I going to say does Paul Kamienski know that they're going to get killed? I don't think so. Not from the evidence and testimony that I've heard. Paul Kamienski is there because he is part and parcel, he put this drug deal together, he made it work, he was there.

And you know what, Tony [Alongi] and Joe [Marsieno] they didn't have any money, but you know what they had, they had a gun and they killed the DeTournays. They murdered them. They murdered them in cold blood. And Kamienski was there and that didn't end the murder, a bullet through the chest or through the head did not end a murder, a murder is finished and the murder ended when that body is disposed of. And I submit to you that's what occurred at that point in time was that Paul Kamienski assisted Marzeno and Alongi in getting rid of the bodies. That he assisted, he helped, he rendered his countenance to that in getting rid of the bodies. He was there. He never – *I'll say this, he never expected it to happen, he didn't expect them to be murdered.* He said that to Donna as soon as they got outside. I couldn't control the situation, but it happened. And he was there and he helped dispose of the bodies.

* * *

> *. . . I've indicated to you that I don't think that Paul Kamienski – I don't think that [he] was a part of a conspiracy to murder those people, I think he very clearly was a part of the conspiracy, that second conspiracy to possess that cocaine with intent to distribute it.*

(Emphasis added). The jury acquitted all defendants of the charges of conspiracy to commit murder and conspiracy to commit robbery. However, the jury convicted the defendants of felony murder, and conspiracy to possess cocaine with the intent to distribute. Marsieno was found guilty, as the principal actor, of murder in the first degree. Kamienski and Alongi were found guilty as accomplices to murder in the first degree.

Thereafter, the trial court granted post-verdict motions filed by Kamienski and Alongi in which they each requested judgments of acquittal on the murder convictions, or in the alternative, a new trial on those charges. During oral argument on those post-verdict motions the prosecutor agreed with the following statement by the trial court: "prior to the afternoon of the 19th there was nothing suggesting that [Kamienski] knew of and agreed to assist in or conspired to commit a robbery or a murder . . . [a]nd the jury so found." Accordingly, the district court granted Kamienski's motion for judgment of acquittal on the murder charges.

The court reasoned that since the jury acquitted Kamienski on the conspiracies to rob and murder, the

state was required to show some evidence of Kamienski's conduct before, during or after the murders to establish his guilt as an accomplice to the murders.[10] However, the court concluded that there was insufficient evidence to convict Kamienski of accomplice liability for either murder or felony murder. In reaching that decision, the court expressed concern about portions of the jury charge on accomplice liability. However, the court held that it could not order a new trial based upon the purportedly erroneous jury charge because the state had not produced sufficient evidence to establish Kamienski's guilt for murder or felony murder. Thus, the court entered a judgment of acquittal on those charges in favor of Kamienski.

The state appealed, and the Appellate Division reversed and reinstated Kamienski's murder convictions. The Appellate Division found no error in the jury charges and concluded: "where a jury is instructed properly, an acquittal under a theory of conspiracy does not as a matter of law preclude a conviction as an accomplice."[11] *State v. Kamienski*,

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[10] The prosecutor agreed that disposing of the bodies after the fact, absent something more, was not sufficient for accomplice liability for murder thereby retreating from the "continuing crime" of murder theory that he had argued to the jury.

[11] The Appellate Division believed that the trial court granted Kamienski's motion for a judgment of acquittal because the jury verdict was inconsistent. However, the court did not grant relief because of inconsistent verdicts (which are allowed);

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603 A.2d 78, 80 (N.J.Super.Ct.App.Div.1992). The Appellate Division believed that the evidence was sufficient to convict Kamienski of accomplice murder and/or felony murder, and it therefore reinstated Kamienski's murder convictions. *Id.* 89-95. Thereafter, the New Jersey Supreme Court refused Kamienski's application for review of the decision of the Appellate Division.

After exhausting his state remedies, Kamienski filed a timely petition under 28 U.S.C. § 2254 in the United States District Court for the District of New Jersey. He challenged his murder convictions on several grounds, including the sufficiency of the evidence. The district court denied the petition because it did not believe that the New Jersey Appellate Division's holding was an unreasonable application of federal law under AEDPA. It explained: "[a]s set forth in the Appellate Division's discussion, there is evidence from which a reasonable jury could have found efforts by Kamienski to facilitate the robbery and murder."

Thereafter, the District Court granted a certificate of appealability "on the question of whether [Kamienski's] criminal conviction was based on legally insufficient evidence in violation of [Kamienski's]

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rather, the trial court granted judgment of acquittal based upon its conclusion that the prosecution had not produced sufficient evidence to establish Kamienski's guilt on those charges beyond a reasonable doubt.

rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution."[12]

Accordingly, we are presented with the single claim: whether Kamienski's murder convictions are supported by sufficient evidence. Kamienski's primary argument is that his murder convictions should be vacated under § 2254(d)(1) because the "evidence failed to prove all the required *actus reus* or *mens rea* elements of these offenses beyond a reasonable doubt."[13]

III. Standard of Review

We review *de novo* a district court's grant or denial of a petition for a writ of habeas corpus. *Pazden v. Maurer,* 424 F.3d 303, 310 (3d Cir.2005). However, like the district court, our review is circumscribed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Under AEDPA:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court

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[12] Additional motions followed that are not relevant to this appeal.

[13] Kamienski makes an alternative argument that his petition should be granted under 28 U.S.C. §§ 2254(d)(2) and (e)(1) because the appellate court's fact finding conclusions were unreasonable and clearly erroneous. Because we find that Kamienski's petition should be granted based on his first argument, we need not reach the second.

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

28 U.S.C. § 2254(d)(1). "A state-court decision is 'contrary to' clearly established federal law if the state court (1) 'contradicts the governing law set forth in [the Supreme] Court's cases' or (2) 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a [different] result.'" *Lambert v. Blackwell*, 387 F.3d 210, 234 (3d Cir.2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). On the other hand, "[a] state-court decision 'involve[s] an unreasonable application' of clearly established federal law if the state court (1) 'identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case'; or (2) 'unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.'" *Id.* at 234 (quoting *Williams*, 529 U.S. at 407). "[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams*, 529 U.S. at 410 (emphasis

in original). Thus, habeas relief requires not only a determination that the state court decision on the merits applied clearly established federal law erroneously or incorrectly, but also that the state court's application was unreasonable. *Id.* at 411; *see also Waddington v. Sarausad,* 129 S.Ct. 823, 831 (2009).

Kamienski argues that the state court unreasonably applied *Jackson v. Virginia's* constitutional requirement that every element of a crime be established beyond a reasonable doubt. 443 U.S. 307, 316 (1979) ("*Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."). A conviction will withstand a challenge under *Jackson* if, when "viewing the evidence [in the light] most [favorable] to the government, there is substantial evidence to support the jury's guilty verdict." *United States v. Wexler,* 838 F.2d 88, 90 (3d Cir.1988);

In a habeas proceeding, however, we do not simply conduct a *de novo* review of the state court's application of that rule. Rather, we must review its sufficiency-of-the-evidence decision under the highly deferential standard of AEDPA. Our task, therefore, is to determine whether, viewing the evidence in the light most favorable to the state, it was objectively unreasonable for the Appellate Division to conclude that a rational trier of fact could have found, beyond

a reasonable doubt, that Kamienski was guilty of felony murder or first-degree murder.

IV. Discussion.

The New Jersey Code defines felony murder as follows:

> criminal homicide constitutes murder when . . . (3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping, carjacking, criminal escape or terrorism. . . . and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants

N.J.S.A. 2C:11-3(a)(3). Here, the state's theory was that all three defendants were guilty of felony murder because the killings occurred in the course of a robbery. A killing in the course of a drug deal would not qualify as felony murder under New Jersey's statute, because distribution of illegal drugs is not one of the predicate felonies listed in the New Jersey statute defining felony murder. Thus, for Kamienski to have been guilty of felony murder, the state had to produce sufficient evidence to allow a reasonable juror to conclude beyond a reasonable doubt that he knowingly participated or aided in the commission of a robbery.

The state also charged Kamienski and Alongi with first degree murder based on their roles as Marsieno's accomplices. Under N.J.S.A. 2C11-3a, first-degree murder occurs when "the actor purposely causes death. . . . or . . . [t]he actor knowingly causes death." "Purposely" is defined as follows:

> A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist.

N.J.S.A. 2C:2-2. "A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result." N.J.S.A. 2C2-2b(2).

The New Jersey Crimes Code specifies that "a person is legally accountable for the conduct of another person when . . . he is an accomplice of such other person in the commission of an offense." N.J.S.A. 2C:2-6(b)(3).

> A person is an accomplice of another person in the commission of an offense if: (1) With the purpose of promoting or facilitating the

> commission of the offense; he (a) Solicits such other person to commit it; (b) Aids or agrees or attempts to aid such other person in planning or committing it. . . .

N.J.S.A. 2C2-6(c). New Jersey's Supreme Court has instructed that "[f]or both the accomplice and his partner to be guilty, 'it is essential that they shared in the intent which is the crime's basic element." *State v. White,* 484 A.2d 691, 695 (N.J.1984); *see also State v. Torres,* 874 A.2d 1084, 1092 (N.J.2005). Thus, to find Kamienski guilty as an accomplice to first-degree murder, the state must show that Kamienski shared the specific intent to kill the DeTournays.

The state has identified copious evidence that Kamienski was involved in the sale of cocaine from the DeTournays to Marsieno and Alongi, and the government clearly proved that he was, even though Kamienski testified in his own behalf and denied all involvement. The jury clearly disbelieved his blanket denial, and the jury's conclusion that Kamienski brokered a cocaine sale between the DeTournays and Marsieno is supported by overwhelming evidence.

Kamienski introduced the DeTournays to Marsieno knowing they were looking for a drug buyer, and he vouched for the actors involved in the transaction, and helped arrange the sale of cocaine. There is also more than sufficient evidence to allow the jury to conclude that Kamienski was involved in disposing of the DeTournays' bodies and covering up

their murders.[14] However, the state has not identified any direct or circumstantial evidence that would allow a reasonable jury to conclude that Kamienski knew of Marsieno's intent to rob and/or murder the DeTournays before Marsieno shot them. Moreover, there is nothing other than rank speculation to suggest that he shared Marsieno's intent to rob and/or murder the DeTournays.

As noted above, the state's murder theory against Kamienski had been based on some abstract notion that the crime of murder is a continuing offense that includes attempts to dispose of the victim's body. That is a theory that is as unique as it is baseless and the state has not pursued it on appeal. Rather, the state now argues that the evidence was sufficient to prove that Kamienski knew of Marsieno's plans to kill the DeTournays and that he assisted by ensuring that Duckworth was not a witness to the crime.

Deference to a jury verdict, even under AEDPA's deferential standard, does not allow rank speculation to substitute for proof beyond a reasonable doubt. Ironically, the prosecutor's closing argument to the jury and post trial representations to the court are the most accurate assessment of the evidence the government produced at trial. The prosecutor who tried this case candidly conceded that the state had

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[14] The state did not charge Kamienski with being an accessory-after-the-fact for his role in hiding the DeTournays' murder, nor was he charged with obstruction of justice.

not proven either the murder or felony murder charge against Kamienski, and we agree.

As noted earlier, the prosecutor told the jury in closing:

> Am I going to say does Paul Kamienski knew that they're going to get killed? I don't think so. Not from the evidence and testimony that I've heard. Paul Kamienski is there because he is part and parcel, he put this drug deal together, he made it work, he was there.
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> He was there. He never – I'll say this, he never expected it to happen, he didn't expect them to be murdered. . . . but it happened. And he was there and he helped dispose of the bodies.
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> I've indicated to you that I don't think that Paul Kamienski – I don't think that [he] was a part of a conspiracy to murder those people, I think he very clearly was a part of the conspiracy, that second conspiracy to possess that cocaine with intent to distribute it.

The prosecutor made a similar remark to the court while opposing Kamienski's motion for a judgment of acquittal or a new trial. He agreed with the judge's observation that: "prior to the afternoon of the 19th there was nothing suggesting that [Kamienski] knew

of and agreed to assist in or conspired to commit a robbery or a murder . . . [a]nd the jury so found."

This case is therefore a bit of a paradox. While arguing for a conviction of first degree murder and felony murder, the prosecutor conceded that the evidence did not establish that Kamienski had the mental state required for a conviction of first degree murder or that he had the knowledge required for a conviction of felony murder .[15] The trial judge who saw all of the witnesses and heard their testimony agreed that the government had not proven either charge beyond a reasonable doubt and entered a judgement of acquittal for Kamienski on both of those charges. Although the Appellate Division subsequently reinstated those convictions, our examination of this record convinces us that the Appellate Division's decision was an unreasonable application of clearly established Supreme Court precedent

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[15] It is not clear whether these admissions rise to the level of a judicial estoppel that would now preclude the government from taking a contrary litigation stance and now insisting that its evidence established Kamienski was guilty of murder and felony murder beyond a reasonable doubt. *See Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir.1996) ("The basic principle of judicial estoppel . . . is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory."). However, since Kamienski does not claim that the government's prior concession precludes it from arguing that the evidence was sufficient to convict Kamienski of murder and felony murder on appeal, we need not explore that issue.

requiring proof of each element of a crime beyond a reasonable doubt.

We realize that "[i]nferences from established facts are accepted methods of proof when no direct evidence is available. It is [nevertheless] essential . . . that there be a logical and convincing connection between the facts established and the conclusion inferred." *United States v. Bycer,* 593 F.2d 549, 550 (3d Cir.1979). When we asked the state to provide a supplemental brief on appeal identifying the evidence from which a jury could reasonably find Kamienski's shared intent to rob and/or murder (or assist in those crimes) the state repeatedly directed us to evidence showing his complicity in the drug deal or evidence showing his involvement in the disposal of the bodies after the murders had been committed. Neither is sufficient to sustain Kamienski's murder convictions.

At argument before us, the state stressed that Kamienski had sequestered Duckworth on the day the drug deal was to be struck and invited us to connect dots that would reveal a picture of his knowledge of the robbery Marsieno was apparently planning and Kamienski's shared intent to kill the DeTournays. However, based on our review of the evidence, the picture is simply not there and its existence can not be inferred absent the kind of guesswork that due process prohibits. Indeed, we can not accept the state's view of the evidence without choking all vitality from the requirement of proof beyond a reasonable doubt.

The government's arguments to the contrary rely not on inferences but on speculation. Although Kamienski and Duckworth had used cocaine together in the past, jurors must speculate to conclude that Kamienski's attempts to remove her from the scene of a very substantial cocaine deal on September 19th suggest anything more than his reluctance to have her witness the only major cocaine transaction he was involved in during their relationship (at least there was no evidence of any other large cocaine transaction).[16] "[I]f the evidence tends to give equal or nearly equal circumstantial support to guilt and to innocence . . . reversal is required: When the evidence is essentially in balance, a reasonable jury must necessarily entertain a reasonable doubt." *See United States v. Ortega Reyna,* 148 F.3d 540, 543 (5th Cir.1998) (internal quotation marks and citations omitted); *see also United States v. Wexler,* 838 F.2d 88, 92 (3d Cir.1988) (vacating conviction for conspiracy to transport hashish where "the evidence is just as consistent, for example, with a conspiracy to transport stolen goods, an entirely different crime").

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[16] We note that the state must rely on an inference to even place Kamienski at the scene when the shootings took place. At trial and on appeal, the argument was that because Kamienski took the unusual step of separating himself from Duckworth at the time designated for the drug deal and because he later told her that he "couldn't control what happened," he must have witnessed the shootings. While the use of inference to conclude Kamienski was present when the DeTournays were shot is permissible, the state must show more than presence to convict for murder.

This record does not contain evidence that would allow an inference that Kamienski purposely or knowingly assisted Marsieno in killing the DeTournays. Marsieno was clearly the "trigger man," and there is nothing to suggest that Kamienski had any part in actually causing the DeTournays' death or that he even knew that Marsieno intended to bring a gun to the drug deal. Nor is there any evidence to support an inference that Kamienski knew Marsieno had a gun and did not intend to pay for the drugs he was trying to get from the DeTournays. Kamienski's mere presence at a meeting the night before in the bar of the Holiday Inn cannot supply that inference because there is no evidence of the substance of the conversation among those involved in the drug transaction. *See United States v. Cooper,* 567 F.2d 252, 254 (3d Cir.1977) (vacating conspiracy conviction where record contained no evidence to show defendant-passenger knew contents of locked trunk compartment contained marijuana). Although Marsieno had the briefcase containing a gun and no cash when Jeanne Yurcisin picked him up from the bar that night at 8:00 pm, there is nothing to support an inference that Kamienski knew that Marsieno was only bringing a gun and no cash. Jeffrey, the drug courier, testified that he was told by the DeTournays on the 18th that the people buying the cocaine were "still getting their money together." To the extent Kamienski was involved in the actual exchange, the evidence only allows an inference that Kamienski believed, like the DeTournays, that Marsieno

intended to pay for the cocaine he was to buy the next day.

We realize, of course, that Kamienski received cocaine from Marsieno at no charge after the murders. The government argues that this should be viewed as "hush money," a reward for Kamienski's involvement in the murders, or payment of his share of the robbery proceeds. However, even if the jury inferred that the cocaine was given to buy Kamienski's silence, it would still not establish knowledge of a robbery or murder before Marsieno killed the DeTournays. Following the killings, Marsieno had every reason to keep Kamienski happy and quiet, and the record can not be stretched to infer that Marsieno's gifts of cocaine to Kamienski reflect anything more. *See Ortega Reyna, supra.*

We realize, of course, that each strand of evidence need not establish guilt beyond a reasonable doubt, nor even support an inference of guilt by itself. Rather, we must view each strand as it is connected to the whole and determine if the totality of evidence, viewed in the light most favorable to the government, establishes guilt beyond a reasonable doubt. Nevertheless, the web of evidence the government produced here simply does not allow a reasonable juror to conclude that Kamienski was guilty of murder or felony murder beyond a reasonable doubt. To paraphrase the prosecutor at trial, Kamienski "was [not] part of a conspiracy to murder these people. [The evidence does establish] very clearly [that] he was a part of the . . . conspiracy to possess . . . cocaine with

intent to distribute it," but that is all he should have been convicted of.

Accordingly, we are convinced that the Appellate Division's conclusion regarding the sufficiency of the evidence underlying Kamienski's convictions was erroneous; the more difficult question is whether it was also "unreasonable" under AEDPA.[17] Although the sufficiency question is legal one, the answer requires close scrutiny of the record and an assessment of the evidence produced for each offense of conviction and for each defendant. As we have noted, there was more than ample evidence of Kamienski's role in brokering a drug transaction. However, the Appellate Division conflated that proof into its inquiry into

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[17] It is not clear whether the Appellate Division's conclusion that the state produced sufficient evidence to convict Kamienski of murder and felony, was merely *dicta* and therefore not entitled to AEDPA deference. The court stated: "[t]hese appeals raise two significant issues: (1) . . . *voir dire* . . . and (2) whether an acquittal on a conspiracy to rob and to murder precluded a conviction on those substantive offenses as an accomplice." 603 A.2d at 80. However, after summarizing the government's evidence (as set forth above), the court concluded that: "[t]he jury could have believed that although Kamienski was not part of an agreement or conspiracy to rob the DeTournays . . . or to murder them, he did purposefully lend assistance and aid to Marzeno in the commission of the robbery and murders. It was up to the jury to determine the meaning and significance of Kamienski's conduct." *Id.* at 93. Accordingly, since the state court opined that the evidence was sufficient to convict Kamienski of murder and felony murder, we will assume *arguendo* that its conclusion is entitled to AEDPA deference whether or not the conclusion was an actual "decision on the merits," or mere *dicta*.

evidence of murder and felony murder. Doing so was not only error, it was unreasonable; it allowed Kamienski to be convicted on something less than proof of "every element of *the* offense" of conviction beyond a reasonable doubt. *Jackson,* 443 U.S. at 316 (discussing *Winship*).

The Appellate Division also unreasonably applied the standard governing when inferences may be relied upon to establish elements of a criminal offense beyond a reasonable doubt. That standard requires that the inference in question must be "more likely than not to flow" from the facts already established. *Leary v. United States,* 395 U.S. 6, 36 (1969). The "more likely than not standard" is well established. It cannot be satisfied here because the record simply does not allow a reasonable juror to infer that Kamienski intended that the DeTournays be robbed or killed. Thus, the district court erred in concluding that the state court's decision to reinstate Kamienski's convictions for murder and felony murder was a reasonable application of Supreme Court precedent to the facts of this case.

V. Conclusion

Accordingly, for all the reasons we have set forth above, we will reverse the district court's order denying habeas relief and remand to that court for it to issue the writ.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALONGI,	x	
v.	x	Civ. A. No. 02-3090
HENDRICKS, et al.,	x	
KAMIENSKI,	x	Civ. A. No. 02-3091
v.	x	**OPINION**
HENDRICKS, et al.	x	(Filed Jul. 26, 2006)

CHESLER, District Judge.

I. INTRODUCTION

This matter comes before the Court on the joint application of petitioners Paul Kamienski and Anthony Alongi (hereinafter "petitioners") for a writ of *habeas corpus* pursuant the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d). For the reasons that follow, the petitioners' application is **DENIED**.

II. FACTS

A. The Trial

On October 7, 1987, petitioners Paul Kamienski and Anthony Alongi, along with Joseph Marseno[1], were indicted by an Ocean County grand jury for, among other things, the September 19, 1983 murders of Henry and Barbara DeTournay. (A1-4.)[2] An eighteen-day trial ensued, at which the following facts were developed.

i. The Evidence

a. Physical Evidence

On September 24, 1983, the body of Henry Nicholas ("Nick") DeTournay was found floating on or near the surface of Barnegat Bay by a volunteer fireman with the East Dover Fire Department Marine Unit, Richard Stevens. (3T at 123:22-131:1; 4T at 108-109.)[3] The body was fastened to a cinder block by a rope three to four feet in length (3T at 126:13-18; 141:18-142:6) about one-half mile from petitioner Alongi's Baron Street, Toms River lagoon-front residence, in the area where petitioner Alongi's lagoon

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[1] Mr. Marseno is also referred to in the papers as "Marsieno" and "Marzeno," and is also known as Michael Testa. The Court shall refer to this defendant as Mr. Marseno.

[2] The State's appellate appendix, which is found at Appendix II to the State's brief, shall be referred to as "A___."

[3] Trial transcripts, of which there are 24 in this case, are referred to as "___T" followed by page and line numbers.

enters the bay. (*See* S-3 and S-4.) The following day, Stevens found the body of Mr. DeTournay's wife, Barbara DeTournay, which had washed up onto Sedge Island (4T at 23:3-17; 27:14-17), an island in Barnegat Bay (3T at 131:19-132:21; 4T at 23:3-24:14) approximately one-half mile from the Lavallette, New Jersey marina where petitioner Kamienski kept his boat. (*See* S-3 and S-4.)

Henry DeTournay's body was wrapped in a blue sleeping bag (4T at 182:16-182:24), which was secured around the body by white clotheslines (4T at 184:18). Under the blue sleeping bag, the body was wrapped in a rust-colored blanket with a satin border or trim (4T at 188:7-15), and below that was a towel with a flower or rose pattern (4T at 185:7-10). A shoe was missing from Mr. DeTournay's left foot. (4T at 188:20-22.)

Mr. DeTournay's wallet contained a business card for petitioner Kamienski, President of Kamienski Funeral Homes, Inc., with a notation that read "Apt. in Garfield (478-2034)" and "Paul and Donna. Boat 793-0312." (7T at 158:14-159:3.) It also contained a piece of paper with directions to petitioner Alongi's Toms River address. (7T at 160:3-8.) Other pieces of paper were also found on Mr. DeTournay, which reflected phone numbers for petitioner Alongi, for a phone booth near his in-laws' Newark residence, and for petitioner Kamiesnki's beeper number. (7T at 162:2-21; 163:23-164:22.)

Barbara DeTournay's body was wrapped in a rust colored blanket with satin trim that was secured in place by ropes. (5T at 24:11-33.) When the wrappings were removed, Barbara DeTournay was observed wearing deck-type corduroy sneakers, crew-type socks, shorts with a belt, a T-shirt with a pocket, jewelry, and a wristwatch. Henry DeTournay's left shoe was found inside the blanket. (5T at 31:6-21.) Both victims died from multiple gunshot wounds. (5T at 137:18-139:19; 131:14-18.) The same type of rope secured the wrappings on both bodies. (5T at 109:6-12.)

Detective Thompson testified about the recovery of a 21-foot black marquis boat, bearing a specific hull number and New Jersey registration number (5T at 47:9-15) that belonged to the brother of petitioner Alongi's girlfriend and present wife, Jackie Sullivan. (*See* 7T at 174:19-175:22.) Fingerprint and serological tests, which would show the presence of semen, saliva, or blood, that were performed on the boat months after the murders were negative. (5T at 46:6-21.) However, a Luminol spray test showed blood stains over certain areas of the deck carpeting of the boat. (5T at 48:12-19.) FBI laboratory test reports revealed insufficient quantities of blood, hair, and fibers collected from the boat to be compared with those found on the blankets and towel that were found over the bodies. (5T at 52:5-53:13.)

Dr. Saliendra K. Sinha performed autopsies of the bodies on September 26, 1983. (5T120:19-122:13; 124:13; 134:13-18.) Dr. Sinha concluded that Henry

DeTournay was choked prior to his death (5T at 125:19-130:23) and that the cause of death was massive hemorrhage due to multiple bullet wounds (5T 131:14-18). The autopsy on Barbara DeTournay showed the cause of death to have been multiple bullet wounds. Dr. Sinha opined that, at the time of the autopsy, the bodies had been exposed to the water for approximately one week, since approximately September 19, 1983. (5T at 132:12-21; 147:1-7.)

b. Petitioner Kamienski

During the investigation of the DeTournays's murder, investigators interviewed petitioner Kamienski. He stated that knew the DeTournays (7T at 204:9-23) and that they arrived in the Ocean Beach, New Jersey area around September 10, 1983 and that they had visited Alongi's house by boat (7T at 206:12-207:2). He further stated he had purchased drugs from the DeTournays and he knew they wished to sell cocaine. (7T at 213:23-214:20.) He later stated they called him during the week prior to September 19, 1983 at his apartment in Garfield to obtain a scale to weigh cocaine. (7T at 219:14-221:2.)

c. Christine Longo

Barbara DeTournay's sister, Christine Longo, lived with their parents, the Boutsikaris's, in Newark, New Jersey. (5T at 172:9-20.) She testified that, around Labor Day, 1983, the DeTournays were visiting the Boutsikaris residence, and they were

interested in selling cocaine at that time. (5T at 173:18-23.) She stated that on September 7th or 8th, 1983, they traveled to the New Jersey shore where they attended a party on a "funeral director's boat" whose name was "Paul." (6T at 31:12-32:20.) Upon her return, Barbara DeTournay told her sister she was "going to make a big drug deal." (6T at 33:20-34:24.)

Longo stated that on September 17, 1983, Henry DeTournay received a call at the Boutsikaris residence and went to his "office," a phone booth just outside the residence. Upon his return, the DeTournays packed and prepared to leave "for the shore." Another call came in at approximately 9:00 at night, they left the Boutsikaris residence, and were not seen thereafter. (6T at 37:21-40:5.) The following week, the Boutsikaris's received phone calls from someone named "Jeff," who was inquiring about the DeTournays's whereabouts and was concerned that he "got ripped off by them." (6T at 88:1-88:15.)

d. Arthur "Buddy" Lehman

Arthur "Buddy" Lehman, a witness for the State, knew the petitioners socially. (15T at 47:6-51:11.) He stated after the spring of 1983, Marseno, Alongi, Kamienski, Jackie Sullivan, and Donna Duckworth were "hanging out together almost on a constant basis. . . . They were spending seven days a week together. . . ." (15T at 54:18-55:18.) He stated he tried to buy cocaine from Marseno and Alongi around

September 10 to 15, 1983, and was assured that within the week, they would have "kilo quality coke for you at about one thousand dollars less an ounce than you're paying now . . . ." and that they would have "a ton [of] South Florida Coke. . . ." (15T at 59:1-14; 60:2-8.) On September 18, 1982, Lehman was assured that Marseno would have the cocaine "within a few days. . . ." (15T at 61:9-22.) On September 19, 1983, Alongi told Lehman he had the product, but that "[my] partner's up in Newark. He'll be back in a few days," when they would meet. (15T at 62:11-19.) On September 24, 1983, when Henry DeTournay's body was recovered but not Barbara's, Kamienski told Lehman "my friends from Florida have been murdered." (15T at 63:3-64:22.) In early October, 1983, Lehman received one ounce of "kilo quality cocaine," which was of high potency and rock-like in texture, on credit from Alongi. (15T at 65:20-67:12.)

e. Sidney Jeffrey, III

Sidney Jeffrey, III was the courier of the cocaine from Florida to be sold by the DeTournays' in New Jersey. He testified under immunity. On September 11, 1983, Barbara DeTournay told Jeffrey she had contacted persons in New Jersey who were interested in buying three kilos of cocaine. (8T at 135:1-137:10.) Jeffrey obtained the three kilos and met the DeTournays at a hotel in Toms River, New Jersey. (8T at 136:7-13.)

On September 18, 1983, Henry DeTournay picked Jeffrey up at the hotel and advised him that the purchasers were not ready because they "were getting their money together" (8T at 139:9-140:21) and that they were having trouble getting the money (9T at 16:8-23). Jeffrey stated that, on September 19, 1983, Barbara arrived at Jeffrey's hotel and advised she was to pick up the cocaine and wait to be picked up. (8T at 142:7-144:12.) Barbara took the cocaine and left in a car that fit the description of petitioner Alongi's car. (8T at 147:18-151:3; 9T at 211:1-6.) The DeTournays never returned to the hotel or contacted him.

Jeffrey called the Boutsikaris residence several times looking for the DeTournays. During one of these calls, he learned that Henry's body had been found, and he then returned to Florida. (8T at 152:7-155:24.)

f. George F. Hunt, Jr.

In September 1983, George F. Hunt, Jr. lived across the street from petitioner Alongi. At trial, Hunt testified that on September 19, 1983 while working in his home office, which overlooks Alongi's residence (9T at 233:11-23), he observed a man who he identified as Henry DeTournay (9T at 244:5-22), approaching Alongi's house (9T at 245:23-246:8). Alongi appeared, greeted the individual, and the two went to the back of the house. (9T at 243:6-244:4.) Hunt did not see the individual again until he noticed his picture in the newspaper and called the

authorities. (9T at 244:5-22.) Hunt stated he had never seen Alongi operate a boat in the two to three years he had lived across the street from him, but had seen Alongi operate a boat twice in the two weeks leading up to September 19, 1983. (9T at 250:1-251:2.) Hunt spoke with Alongi between September 19, 1983 and the time he saw Henry DeTournay's picture in the paper, about Alongi installing a new rug in the garage of his house. (9T at 253:9-255:3.)

g. Donna Sue Duckworth

In September of 1983, Donna Sue Duckworth lived with petitioner Kamienski in his Garfield, New Jersey apartment and on his boat. (11T at 4:13-5:12.) She testified that, during their six-year relationship, they were "together every day, all the time, about 24 hours a day. . . ." (11T at 6:17-19; 41:7-12.) Duckworth first met Alongi and Marzieno during the Summer of 1983 on Kamienski's boat when she and Kamienski had purchased cocaine from them. After that meeting, the four were in touch "almost every day" socially and for the purpose of buying cocaine. (11T at 14:9-15:25.) Duckworth met the DeTournays in the summer of 1982 at the marina where both they and Kamienski docked their boats. Kamienski, Duckworth, and the DeTournays maintained social contact and used cocaine together. (11T at 16:12-17:10.)

On September 3, 1983, Henry DeTournay asked Kamienski if he knew anyone interested in purchasing three kilos of cocaine, to which Kamienski

replied affirmatively. (11T at 20:8-14.) On September 5, 1983, Kamienski, Duckworth, and the DeTournays took a boat ride over to Alongi's house and Kamienski introduced the DeTournays to Alongi. During the introduction, Kamienski vouched for the both the DeTournays and for Alongi. (11T at 29:1-8.)

On September 9, 1983, while at his Garfield, New Jersey apartment, Kamienski received a phone call from Nick DeTournay and she heard Kamienski say "[n]o, he didn't have a scale and to get off the boat." (11T at 33:20-34:25.) Duckworth's original statement regarding the September 9, 1983 telephone call included a reference to co-defendant Alongi that suggested he was also on Kamienski's boat with DeTournay during the call (9T at 85:7-9) but the trial court suppressed the reference to Alongi (2T at 204:4-206:16). At trial, Kamienski stated that Nick DeTournay never told him who was on the boat with him. (19T at 52:11-24.) Duckworth and Kamienski returned to the New Jersey shore later that day. (11T at 35:13-17.)

Duckworth testified that, during a September 17, 1983 party at Alongi's house, there was talk of "a good deal coming down" and "good coke . . . coming into town. . . ." (11T at 36:13-37:16.) On September 18, 1983, Marseno, Alongi, Kamienski, Jackie Sullivan, and Duckworth met at the Holiday Inn in Toms River. (11T at 37:17-39:8.)

On September 19, 1983, Kamienski told Duckworth that she would be left at a friend's house

for the day. She stated this was unusual since Kamienski "never let me really out of his sight. . . ." and she always drove Kamienski's car because his license was suspended. On September 19, 1983, however, Duckworth spent the day at her friend's house, and Kamienski picked her up around dusk, and they went to Alongi's house. (11T at 40:18-42:3.) Upon entering Alongi's house, Kamienski directed Duckworth to wait upstairs with Alongi's girlfriend, Sullivan. (11T at 42:4-8.) When Sullivan attended a phone call, Duckworth went downstairs looking for Kamienski. (11T at 42:10-18.) She walked out onto the sidewalk where she saw Kamienski standing by the dock, looking toward the boat. (11T at 42:20-24.) She stated:

> I saw Tony [Alongi] in the boat and I saw what appeared to me to be a body shape in the sleeping bag and he started lunging out of the boat and . . . I turned around and started going back to the house real fast.

(11T at 43:1-8.) She stated that defendant Alongi lunged at her and frightened her, but Kamienski assured him, "she's alright." She stated the boat was wet and that "everything appeared wet." (11T at 43:9-44:1.)

Alongi spoke with Duckworth after this incident, showed her a gun, and told her "if [she] didn't be quiet [she would] end up like her friends," and "Paul wouldn't be able to save [her] if [she] opened her mouth. . . ." (11T at 44:4-46:18.) When Duckworth and Kamienski left Alongi's house that night, Duckworth

questioned Kamienski about what she had seen. He stated "that he couldn't control what happened . . . ," that "Nick went first, Barbara didn't suffer . . . ," and "[i]f we didn't shut up that he wouldn't be able to save [Duckworth] or himself." (11 at 47:11-16.)

Duckworth and Kamienski returned to Kamienski's boat at the Ocean Beach Marina. She stated that a teak box containing cleaning rags and other supplies was kept on the catwalk to the boat and was used as a step in boarding the boat. She stated that the box was missing that night and the boat had been moved forward. (11T at 48:14-49:14.)

On September 24, 1983 (the day Henry DeTournay's body was recovered), while dining at the Top O' the Mast restaurant in Seaside Park, New Jersey, Duckworth and Kamienski were informed that the police were there for Kamienski. Kamienski directed Duckworth to call Alongi, who arrived within ten minutes. Alongi directed Duckworth to drive Kamienski to the police station. (11T at 51:21-54:5.)

On October 1, 1983, Marseno, Kamienski, Alongi, Sullivan, Duckworth, and Jeannie Yurcisin (Marseno's girlfriend) met at the Top O' the Mast. Marseno stated that bodies were found and that "[t]hey were like scared puppies . . . it was easy." (11T at 57:1-23.) Marseno told Duckworth she should "straighten up or [she] could end up like them. . . ." He then grabbed her jaw saying she should wise up. (11T at 58:13-59:23.)

At around this time, there was an increase in the supply and quality of cocaine. Duckworth described the cocaine as "stronger" and "in rock form." (11T at 61:10-11.) Duckworth stated that Kamienski had been looking for a cocaine grinder used to grind the rock cocaine into powder. (11T at 62:7-12.)

Duckworth further testified about the blankets and rope found with the DeTournays' bodies. Specifically, Exhibit S-34 in evidence depicted a blanket with some rope wrapped around it. Duckworth identified S-34 as the sleeping bag seen on the boat at defendant Alongi's house on September 19, 1983. S-37 depicted a towel recovered with the DeTournay's bodies, which had been seen before in the teak box where rags were kept for Kamienski's boat. Also, she stated the blankets recovered with the DeTournays's bodies were similar to those on Kamienski's boat. (11T at 69:13-72:7.) Moreover, Duckworth stated she had been boating since age five and was familiar with how to secure boats and the knots boaters used to secure them. Kamienski used a peculiar "hitch" knot to secure a boat, rather than that taught to Duckworth. S-35 in evidence depicted the bodies wrapped and secured by rope in hitch knots, the same knots that Duckworth stated Kamienski tied. (11T at 67:20-68:25.)

h. Jean Yurcisin

Jean Yurcisin, Marseno's companion, stated that, on September 16 or 17, 1983, she was at a party at

Alongi's house where Marseno told her he was expecting to get a great deal of cocaine that was "supposed to burn at 88 to 92%, and it was coming up from Florida from friends of Paul [Kamienski] and Donna's." (15T at 338:20-341:16.) She stated, on September 18, 1983, Marseno told her to pick him up at the Holiday Inn and that she should not be late because "he would be carrying." (15T at 342:13-25.) When she met him, Marseno told her "they wanted to see the money first, and that he – he had no intention of paying them any money, that he would kill them before they got any of his money." (15T at 343:1-14.) Marseno was carrying a briefcase with no money, but only a gun inside. (15T at 343:15-344:17.) The following day, Monday, September 19, 1983, Marseno called Yurcisin at about 10:30 p.m. and told her "the deal went down," and that he would be leaving town because things were "going to be getting pretty hot." (15T at 345:5-20.)

At the September 24, 1983 meeting at the Top O' the Mast restaurant, Yurcisin stated Alongi asked her where Marseno was and stated that a body was found and it was very important he speak with Marseno. (15T at 345:18-346:22.) This was the night police questioned Kamienski. (11T at 51:21-54:16.) Yurcisin further stated that Marseno gave cocaine to Alongi and Kamienski ounces at a time but did not take money in return. (15T at 353:25-356:7.)

ii. Closing Arguments

At closing arguments, the prosecutor stated as follows:

> Paul Kamienski was there when [the DeTournays] were murdered. Paul Kamienski was there because he put this deal together, he had brokered it, the DeTournays trusted him. He was the person they trusted.
>
> . . .
>
> Am I going to say does Paul Kamienski know that they're going to get killed? I don't think so. Not from the evidence and testimony that I've heard. Paul Kamienski is there because he is part and parcel, he put this drug deal together, he made it work, he was there.
>
> And you know what, Tony [Alongi] and Joe [Marseno] they didn't have any money, but you know what they had, they had a gun and they killed the DeTournays. They murdered them. They murdered them in cold blood. And Kamienski was there and that didn't end the murder, a bullet through the chest or through the head did not end a murder, a murder is finished and the murder ended when that body is disposed of. And I submit to you that's what occurred at that point in time was that Paul Kamienski assisted Marzeno and Alongi in getting rid of the bodies. That he assisted, he helped, he rendered his countenance to that in getting rid of the bodies. He was there. He never –

> I'll say this, he never expected it to happen, he didn't expect them to be murdered. He said that to Donna as soon as they got outside. I couldn't control the situation, but it happened. And he was there and he helped dispose of the bodies.

(19T at 276:5-277:20.) The prosecutor further argued:

> Sidney Jeffrey brought the cocaine up from Florida ... [the DeTournays] were introduced for the purpose of that drug deal by Paul Kamienski to Anthony Alongi and Joe Marzeno. That Paul Kamienski vouched for them. In that deal he was the common thread in setting that deal up, he vouched for both sides ...

(19T at 295:6-15.) He went on:

> And I've indicated to you that I don't think that Paul Kamienski – I don't think that [he] was a part of a conspiracy to murder those people, I think he very clearly was a part of the conspiracy, that second conspiracy to possess that cocaine with intent to distribute it. He, in fact, received those ounces of cocaine
>
> ....

(19T at 296:17-25.)

iii. The Jury's Verdict and the Judgment N.O.V.

On November 18, 1988, the jury found petitioners Kamienski and Alongi guilty as accomplices of murder in the first degree (Counts One and Two), felony murder (Count Five), and conspiracy to possess cocaine with intent to distribute (Count Six). They were found not guilty of conspiracy to commit murder and conspiracy to commit robbery. (A9, A13, A38, A47.) Marseno was found guilty, as the primary actor, of murder in the first degree (Counts One and Two), guilty of murder during the commission of a felony (Count Five), and conspiracy to possess cocaine with intent to distribute (Count Six). He was found not guilty of conspiracy to commit murder, and conspiracy to commit robbery. (A5, A29.)

After the verdict, all of the defendants moved for new trials and for judgment N.O.V. On December 21, 1988, Judge Perskie entered judgments of acquittal in favor of Alongi and Kamienski on Counts One, Two, and Five, the murder and felony murder charges (A37, A47) and denied defendants Marseno's motion for acquittal. In granting the judgment N.O.V., the trial court reasoned as follows:

> The verdict acquitting defendants Alongi and Kamienski of the conspiracy to rob or to murder would preclude a retrial on the theory that they were chargable as principals for the murders or felony murders by reason of their *conspiracy* status. This would leave for retrial only the charge that these

defendants were guilty of the murders and felony murders as *accomplices*. There is not sufficient evidence to support such a verdict. While it can be argued that all of the conduct of defendants Alongi and Kamienski before the afternoon of the 19th is consistent with accomplice liability and the requisite purpose to promote or facilitate the crimes of robbery and murder, the verdict acquitting them of conspiracy to rob or to murder renders this theory untenable. If defendants Alongi and Kamienski did not conspire to commit these crimes, they could be charged therewith in a new trial only as accomplices *and only on the basis of their actions during the commission of the crimes*. There was no evidence of their conduct during the commission of the crimes except, inferentially, their presence at the scene, which would not by itself suffice to sustain a verdict. The State relies upon this inference to sustain the further inference that defendants Alongi and Kamienski assented to the robbery and murders, lent to the crimes their countenance and approval, and thereby are chargable therewith as accomplices. This latter inference, however, rests not upon any *evidence* of their presence at the scene of the crimes but upon the *inference* of their presence. Thus there does not appear to be sufficient evidence to establish the requisite purpose to promote or facilitate the crimes of robbery or murder, as opposed to the crime of possession of controlled dangerous substance with intent to distribute, in the conduct of defendants

> Alongi and Kamienski prior to or during the meeting on the afternoon of the 19th.

State v. Kamienski, 254 N.J. Super. 75, 97-98 (App. Div. 1992) (emphasis added) (quoting trial court's transcript of judgment N.O.V.).

B. The State's Appeal of Judge Perskie's Judgment N.O.V. Ruling

The State appealed the trial judge's ruling to the New Jersey Appellate Division, arguing the judgment N.O.V. should be reversed and the verdicts reinstated because (1) there was no inconsistency in the verdicts or, alternatively, inconsistent verdicts do not vitiate an otherwise reasonable verdict, (2) there was sufficient evidence upon which a jury could find Alongi and Kamienski guilty as accomplices to murder, and (3) defendants were properly found guilty of felony murder as accomplices to a robbery. *Kamienski,* 254 N.J. Super. at 82-83. In a published opinion, the Appellate Division reversed the trial judge and reinstated the guilty verdicts. Relevant portions of the Appellate Division's opinion are discussed in detail below. Petitioners' application for certification to the New Jersey Supreme Court was denied.

C. Alongi and Kamienski's Joint Petition for Post-Conviction Relief – The *Brady-Giglio* Materials

On April 10, 1997, Alongi and Kamienski filed a joint petition for post-conviction relief, arguing the

State failed to disclose information to the defense in violation of *Brady v. Maryland,* 373 U.S. 83 (1963) and *Giglio v. United States,* 405 U.S. 150 (1972). They argued the State (1) withheld information that Donna Sue Duckworth would receive benefits from the state in connection with an unrelated drug charge in return for testimony against Messrs. Kamienski and Alongi, (2) failed to correct Ms. Duckworth's testimony that no such promises were made; and (3) failed to disclose Ms. Duckworth's previous grand jury testimony. The details of this petition and related proceedings are discussed *infra* at Part III.D.

D. The Instant Applications

On June 26, 2002, petitioners filed their applications for *habeas corpus* relief. Broadly stated, petitioners argue: (1) they present cognizable and reviewable claims (Petitioners' Brief ("Pb") at 22-31, Point I); (2) the State's evidence was insufficient to establish guilt of murder (Pb at 32-48, Point II); (3) the jury selection process violated petitioners' Sixth and Fourteenth Amendment rights (*id.* at 49-61, Point III); and (4) petitioners' Due Process rights were violated by the suppression of *Brady-Giglio* material (*id.* at 62-69, Point IV). Petitioner Kamienski further argues the denial of his severance and mistrial applications violated his right to a fair trial under *Bruton v. United States,* 391 U.S. 123 (1968). (*Id.* at 70-79, Point V.) Petitioner Alongi argues he was denied effective assistance of counsel. (*Id.* at 80-83, Point VI.) On October 15, 2003,

petitioner Kamienski filed an "Amendment & Supplement to Petition" asserting new grounds for relief. By Order and Opinion dated May 10, 2005, the Court disallowed portions of the Supplemental Petition as untimely, but allowed certain others.[4] The allowed amended claims are addressed *infra*.

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[4] By letter dated June 16, 2006, petitioner Kamienski sought leave to submit a motion for reconsideration of this Court's May 10, 2005 Order barring certain claims under the AEDPA's one-year statute of limitations. (Letter of Timothy J. McInnis, Esq. dated June 16, 2006 ("McInnis Ltr.") at 1.) Kamienski argues that, in view of the Supreme Court's ruling in *House v. Bell*, ___ U.S. ___, 126 S.Ct. 2064, 2006 WL 1584475 (2006), this Court applied the incorrect standard in ruling that the AEDPA limitations period governing his untimely application to amend his petition to add a *Brady* claim was not tolled by the "actual innocence" doctrine. Specifically, he argues the Court considered the proposed *Brady* evidence in isolation rather than making a "holistic judgment about 'all the evidence,'" as required by *House*.

Relief by way of a motion for reconsideration is "an extraordinary remedy" that is to be granted "very sparingly." *See NL Indus. Inc. v. Commercial Union Ins. Co.*, 935 F. Supp. 513, 516 (D.N.J. 1996); *Maldonado v. Lucca*, 636 F. Supp. 621, 630 (D.N.J. 1986). A motion under Rule 7.1(g) may be granted if: (1) "an intervening change in the controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice." *Database Am., Inc. v. Bellsouth Adver. & Publ'g Corp.*, 825 F. Supp. 1216, 1220 (D.N.J. 1993); *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir 1995). Local Rule 7.1(g) requires the moving party to "set[ ] forth concisely the matters or controlling decisions which counsel believes the [court] has overlooked." L. Civ. R. 7.1(g). For the purpose of this discussion, the Court will assume that *House* can be applied retroactively to the Court's May 10, 2005 Opinion and Order.

(Continued on following page)

III. DISCUSSION

A. Standards Under Section 2254(d)

The AEDPA provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

Petitioner's arguments do not warrant reconsideration of the May 10, 2005 Order. In its May 10, 2005 Opinion, the Court held that the petitioner did not show it was "more likely than not that no reasonable juror would have convicted him in light of the new evidence." (May 11, 2005 Opinion at 18.) While the Court did not articulate the exact standard later set by the *House* court, it did not limit its analysis to the proposed new evidence in isolation. Indeed, the Court expressly considered other evidence before the jury, as demonstrated by its reasoning that "the jury in this case heard testimony from Detective Thompson that the FBI's tests on everything that was submitted with regard to the entire investigation showed that there were no comparisons that could be made between the items taken from the victims and the Defendants." (*See* May 11, 2005 at 4-5.) Nonetheless, even if the Court applied the incorrect standard, after reviewing the totality of the evidence, including the evidence discussed in part III.B.iv. of this Opinion and Detective Thompson's testimony cited above, the Court concludes that evidence of the proposed FBI lab tests and attendant documents does not create a likelihood that a reasonable jury would find petitioner innocent. *See House*, 126 S.Ct. at 2077. The Court, therefore, need not reach the issue of whether or not a showing of actual innocence tolls the AEDPA limitations period. For this reason, the Court denies petitioner's request for leave to file a motion for reconsideration.

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254.

A district court may grant a writ under the "contrary to" clause of Section 2254(d) if it concludes the state-court decision contradicts the governing law as set forth by the Supreme Court, or differs from a decision of the Supreme Court made on materially indistinguishable facts. *Williams v. Taylor,* 529 U.S. 362, 412-13 (2000). Under the "unreasonable application" clause, a court may grant a writ if the state court identified the correct Supreme Court precedent, but applied it to the facts in an unreasonable manner. *Id.* at 413. It may not grant relief, however, "unless a state court's application of clearly established federal law was objectively unreasonable; an incorrect application of federal law alone does not warrant relief." *Keller v. Larkins,* 251 F.3d 408, 418 (3d Cir. 2001). A court may also grant a writ under Section 2254(d)(2) if the state court decision was based on an objectively unreasonable factual determination. *Miller-El v. Cockrell,* 537 U.S. 322, 340 (2003).

In *Williams,* the Supreme Court cautioned that the "habeas corpus is not to be used as a second criminal trial, and federal courts are not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals." 529 U.S. at 383. Rather, the *Williams* court instructed district courts to "attend closely to those considered decisions, and give them full effect when their findings and judgments are consistent with federal law." *Id.* (citing *Thompson v. Keohane,* 516 U.S. 99, 107-116 (1995)). In this regard, a federal habeas court must presume that a state court's finding of fact are correct, and petitioners bear the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Jacobs v. Horn,* 395 F.3d 92, 99 (3d Cir. 2005).

The Court of Appeals for the Third Circuit has qualified the application of these standards as follows:

> AEDPA's deferential standards of review do not apply "unless it is clear from the face of the state court decision that the merits of the petitioner's constitutional claims were examined in light of federal law as established by the Supreme Court of the United States." *Everett v. Beard,* 290 F.3d 500, 508 (3d Cir. 2002). In cases where the AEDPA standards of review do not apply, federal habeas courts apply pre-AEDPA standards of review. *Id.* Prior to AEDPA, federal habeas courts conducted a de novo

> review over pure legal questions and mixed questions of law and fact. *Appel v. Horn,* 250 F.3d 203, 210 (3d Cir. 2001). In such circumstances, the state court's factual determinations are still presumed to be correct, rebuttable upon a showing of clear and convincing evidence under § 2254(e)(1). *Id.*

Jacobs, 395 F.3d at 100.

Thus, where the state court applied federal law, the Court shall consider whether or not such application was contrary to, or constituted an unreasonable application of, federal law under the AEDPA. In such cases, there is deference to both factual and legal determinations. Where the state court did not apply federal law as established by the supreme Court, the Court shall review its legal determinations *de novo* and presume its factual determinations to be correct, rebuttable upon a showing of clear and convincing evidence. With these principles in mind, the Court turns to the petitioners' arguments.

B. Sufficiency of the Evidence

Petitioners contend that the State's evidence was not legally sufficient to establish their guilt of murder as accomplices and that the jury charge on that issue was flawed. (Pb at 32-48, Point II.) They argue the evidence failed to establish that, at any time prior to the robbery/murders, petitioners had even a foreboding that co-defendant Marseno was going to rob and murder the DeTournays, and that they allegedly

engaged in certain acts antecedent to the robbery/murders, "with the purpose or knowledge in promoting or facilitating [those crimes]." (*Id.* at 43.) In short, petitioners claim that while the evidence may support the acts in furtherance of a conspiracy to complete a multi-kilo cocaine deal, they cannot support actions related to the planing, promoting, or facilitating robbery or murder.

Accordingly, petitioners argue the Appellate Division's reinstatement of their murder convictions resulted in an unreasonable application of clearly established federal law, namely, *In re Winship,* 397 U.S. 358, 364 (1970), which requires that each element of a criminal offense be proved beyond a reasonable doubt. (Pb. at 32-33.) They argue the Appellate Division drew inferences from the evidence that no reasonable jury would have drawn to establish petitioners' guilt as accomplices. (*Id.* at 33.) They argue the Appellate Division unreasonably found that evidence of conspiracy to possess cocaine with intent to distribute also evidenced their accessorial liability for murder and robbery. (*Id.* at 44.) Thus, the Court must determine whether or not it was reasonable for the Appellate Division to hold that the evidence and inferences drawn therefrom were sufficient for a jury to find accessorial liability for murder and felony murder.

i. The Appellate Division's Rulings

On appeal, petitioners argued the State's evidence was insufficient to support a finding of accomplice liability because (1) Duckworth's and Lehman's testimony was insufficient to establish defendant Kamienski's presence at Alongi's house when the DeTournays were murdered (82a)[5]; (2) there was no evidence that Kamienski participated in planning the murders (83a); (3) there was no evidence that defendant Kamienski attended any of the meetings with the DeTournays where the subject of cocaine was discussed (*id.*); (4) Kamienski's guilt cannot be based on the argument that he shared in the proceeds of the robbery and helped dispose of the bodies (84a-85a); and (5) Kamienski's purpose cannot be inferred from the fact that on September 19, 1983, he drove Duckworth to a friend's house for the day (85a).

The Appellate Division held, first, there was no error in the jury instruction because, taken as a whole, the jury charge informed the jury it was obligated to consider all the evidence and the surrounding circumstances in deciding whether petitioners aided or assisted Marseno in robbing and killing the DeTournays, and whether they acted with the same purpose as Marseno. *Kamienski,* 254 N.J. Super. at 92-93.

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[5] Page numbers within petitioners' joint appendix shall be referred to as "___a."

Second, Appellate Division held that the jury's verdict of not guilty of a conspiracy to rob and murder was not inconsistent with its verdict of guilty of felony murder based on a killing during the course of a robbery and murder as accomplices. *Id.* at 93. It reasoned that "even though the jury found that the State failed to prove a conspiracy to rob or to murder, much of the evidence presented to establish such a conspiracy was also relevant to establishing Alongi and Kamienski's guilt as accomplices to Marseno in the commission of the substantive offenses of murders and felony murders." *Id.* at 89 (citations omitted).

Third, and relatedly, the Appellate Division held the trial court erred in granting judgment N.O.V. *Id.* at 98. The court noted the trial judge's erroneous reasoning that the jury's acquittal of petitioners of conspiracy to rob and to murder precluded a verdict on accomplice liability. *Id.* It noted a further flaw in the trial court's reasoning that petitioners could only be charged "as accomplices and only on the basis of their actions during the commission of the crimes." *Id.* at 97, 98. The court held that accomplice liability may be proved, not only though direct evidence, but through circumstantial evidence and participation and acquiescence may be inferred from conduct, as well as spoken words. *Id.* at 99-100. The Appellate Division then summarized the evidence supporting accomplice liability against the petitioners and held that "the evidence against Alongi and Kamienski was

sufficient for any rational jury to find them guilty of felony murder and murders." *Id.* at 107.

ii. *In re Winship* and *Jackson v. Virginia*

Petitioners argue the Appellate Division's decision constituted an unreasonable application of *In re Winship,* which holds that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364; *see also Lambert v. Blackwell,* 387 F.3d 210, 235 (3d Cir. 2004) (holding "Section 2254(d)(2) mandates the federal habeas court to assess whether the state court's determination was reasonable or unreasonable given that evidence" and, if it is unreasonable, "habeas relief is warranted."). When *habeas corpus* petitioner challenges the sufficiency of evidence supporting his criminal conviction, the Court must inquire:

> whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 319 (1979). As the Jackson Court explained, circumstantial evidence by itself may suffice for a finding of guilt beyond a reasonable doubt. *Id.* at 324-25. In this regard, the Appellate Division stated:

The standard for determining the sufficiency of the evidence requires us to view all of the evidence, both direct and circumstantial, in a light most favorable to the State and to consider all reasonable inferences which reasonably could be drawn from that evidence. *State v. Brown,* 80 N.J. 587, 591-592, 404 A.2d 1111 (1979); *State v. Reyes,* 50 N.J. 454, 458-459, 236 A.2d 385 (1967). "[T]he veracity of each inference need not be established beyond a reasonable doubt in order for the jury to draw the inference." *State v. Brown, supra,* 80 N.J. at 592, 404 A.2d 1111; *State v. DiRienzo,* 53 N.J. 360, 376, 251 A.2d 99 (1969). The sufficiency standard has been satisfied if we are able to conclude that any "rational trier of fact could have found the essential elements of the crimes" of murder and felony murder beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573, *reh'g denied,* 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979); *State v. Marshall, supra,* 123 N.J. at 136, 586 A.2d 85; *State v. Martin,* 119 N.J. 2, 8, 573 A.2d 1359 (1990); *State v. Brown, supra,* 80 N.J. at 592, 404 A.2d 1111.

Our careful study of the record, in light of the appropriate standard, satisfies us that there is no basis to conclude that the jury verdict on the murders and felony murders constituted a "manifest denial of justice." R. 3:20-1; *see State v. Martinez,* 97 N.J. 567, 571-572, 483 A.2d 117 (1984). "Concerted action [as an accomplice] need not be proved by direct evidence of a formal plan to commit

> a crime, which was verbally agreed to by all who were charged. Rather, the proof may be circumstantial and participation and acquiescence may be inferred from conduct, as well as spoken words." *State v. Gelb, supra,* 212 N.J. Super. at 591-592, 515 A.2d 1246 (citing *State v. Smith,* 32 N.J. 501, 522, 161 A.2d 520 (1960), *cert. denied,* 364 U.S. 936, 81 S.Ct. 383, 5 L.Ed.2d 367 (1961)).

Kamienski, 254 N.J. Super. at 99-100.

iii. Elements of the Criminal Offenses

The criminal offenses at issue in this application are: knowing or purposeful murder in violation of N.J.S.A. 2C:11-3a(1)(2) (Counts One and Two), and murder in the commission of a robbery in violation of N.J.S.A. 2C:15-1 (Count Five). (A1-4.)

a. Murder

Defendant Marseno and petitioners Kamienski and Alongi were found guilty of murder in violation of N.J.S.A. 2C:1-3a(1) and (2). The statute states:

> Except as provided in section 2C:11-4 criminal homicide constitutes murder when:
>
> (1) The actor purposely causes death or serious bodily injury resulting in death; or
>
> (2) The actor knowingly causes death or serious bodily injury resulting in death. . . .

N.J.S.A. 2C:1-3a. One acts "purposely" where:

> it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist.

N.J.S.A. 2C:2-2(1). One acts "knowingly" if "he is aware that it is practically certain that his conduct will cause such a result." N.J.S.A. 2C:2-2(2). Thus, a "murder conviction based on 'knowing' conduct can result from conduct which is practically certain to cause serious bodily injury when death is a result fo the injury caused . . . [and] [s]imilarly, a murder conviction based on 'purposeful' conduct can result from the purposeful causing of serious bodily injury when death is a result of the injury caused." *State v. Martin,* 213 N.J. Super. 426, 433 (App. Div. 1986).

b. Felony Murder

A defendant is guilty of felony murder if he, "acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, sexual assault, arson, burglary, kidnapping or criminal escape, and in the course of any such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants. . . ." N.J.S.A. 2C:11-3a(3). Thus, the elements of felony murder are, essentially: (1) a death

of someone not participating in the underlying felony; that (2) occurred during the attempt, commission of, or immediate flight from, an underlying felony, which (3) is one of the felonies enumerated in the statute (e.g., robbery[6]); and (4) the underlying felony caused the death.

Intent to commit the underlying felony is sufficient to prove felony murder. *State v. Gerald,* 113 N.J. 40, 88 (1988); *see also State v. Darby,* 200 N.J. Super. 327, 331 (App. Div. 1984) (holding "felony murder requires only a showing that a death was caused during the commission of (or attempted commission or flight from) one of the crimes designated in the statute. The State need not prove that the death was purposely or knowingly committed; a wholly unintended killing is murder if it results from the commission of the underlying felony . . . a felony murder i.e., a death caused neither knowingly or purposely, is by definition not a result which is purposely planned."); *State v. Stentson,* 174 N.J. Super. 402, 407 (Law Div. 1980) (holding the intent element to the New Jersey felony murder rule "depends upon a theory of transferred intent; intent to commit the felony is enough even through there is not intent to

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[6] N.J.S.A. 2C:15-1 sets for the following elements of the crime of robbery: (1) an actual theft is attempted or committed; (2) bodily injury, force, or threats are used to facilitate the commission of the theft; and (3) the bodily injury or threat activity happened in the course of the theft's commission or in immediate flight after the theft's attempt or commission.

kill."). In short, a finding of guilt for felony murder does not require proof of intent to murder beyond a reasonable doubt.

N.J.S.A. 2C:2-3 sets forth the standard to determine whether or not the underlying felony caused the death. It states:

> a. Conduct is the cause of a result when:
>
> (1) it is an antecedent but for which the result in question would have occurred; and
>
> . . .
>
> e. When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.

Thus, a predicate felony under N.J.S.A. 2C:11-3a(3) gives rise to felony murder only where it was the "but for" cause of death and the death was a probable consequence of the actors' conduct. *See State v. Smith,* 210 N.J. Super. 43, 55-56 (App. Div. 1986).

c. Accomplice Liability

Petitioners were convicted as accomplices to Marseno's murder of the DeTournays and felony murder. A person may be found guilty of an offense if it is committed "by the conduct of another person for which he is legally accountable. . . ." N.J.S.A. 2C:2-6a. Legal accountability exists when a person "is an

accomplice of such other person in the commission of an offense." N.J.S.A. 2C:2-6b(3). A person is the accomplice of another when:

> [w]ith the purpose of promoting or facilitating the commission of the offense; he
>
> (a) Solicits such other person to commit it;
>
> (b) Aids or agrees or attempts to aid such other person in planning or committing it; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make proper effort so to do.

N.J.S.A. 2C:2-6c(1); *see also State v. White,* 98 N.J. 122, 128-29 (1984) (holding "[b]y definition an accomplice must be a person who acts with the *purpose* of promoting or facilitating the commission of *the* substantive offense for which he is charged as an accomplice."). Stated differently,

> A defendant is guilty as an accomplice when "[w]ith the purpose of promoting or facilitating the commission of the offense; he . . . [a]ids or agrees or attempts to aid such other person in planning or committing it." N.J.S.A. 2C:2-6c. "[F]or accomplice liability to attach the defendant must have a purpose that someone else engage in the conduct which constitutes the particular crime charged." John M. Cannel, New Jersey Criminal Code Annotated, Comment 7 on N.J.S.A. 2C:2-6 (1996-97).

State v. Norman, 151 N.J. 5, 31-32 (1997). In short, if a "defendant possesses "whatever culpability is required for the substantive crime," and "the defendant . . . actually foresee[s] and intend[s] the result of his or her acts," then he is guilty as an accomplice. *State v. Bridges,* 133 N.J. 447, 456, 628 A.2d 270 (1993) (internal citations omitted).

iv. Analysis

The Appellate Division's holding does not represent an unreasonable application of federal law under the AEDPA. As set forth in the Appellate Division's discussion, *see Kamienski,* 254 N.J. Super. at 100-05, there is evidence from which a reasonable jury could have found efforts by Kamienski to facilitate the robbery and murder. For example, Duckworth testified about Kamienski's admission that he was present at the time of the murders. She further identified that knots used to tie the DeTournays' bodies as peculiar to Kamienski. Based on this evidence, and other evidence introduced at trial, a reasonable jury could have found Kamienski to have introduced the DeTournays to Alongi and Marseno, arranged the September 19, 1983 meeting, ensured the absence of an eye witness – Donna Duckworth – who would normally have been with him, furnished instrumentalities of the crime by supplying the blankets and a towel, was present during the murders and disposal of the bodies, assisted in disposing the bodies, took steps to ensure the secrecy of the crime (including alluding to physical harm to Duckworth if

she told anyone what she saw), and partook in the fruits of the robbery and murders.

Evidence against Alongi further included Mr. Hunt's testimony that he saw Alongi with Nick DeTournay on September 19, 1983 at Alongi's residence and, shortly thereafter, replaced the carpet in his basement. Moreover, Duckworth testified that she witnessed Alongi in the boat with the forms that looked like bodies on September 19, 1983, that he lunged at her but stopped when Kamienski told him she would not tell anyone, and that he subsequently threatened her if she told anyone what she saw.

While some of this evidence is circumstantial, the Appellate Division's holding that it, along with reasonable inferences drawn in favor of the prosecution, was sufficient for a rational jury to find petitioners guilty of felony murder and murder.[7] The Appellate Division, therefore, did not unreasonably apply federal law in reinstating the jury's verdict.

The above-referenced evidence, and other evidence found in the record and noted by the Appellate Division, could reasonably support a finding of

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[7] The prosecutor's closing argument, which petitioners emphasize in their brief, does not change this analysis. His tactical decision to focus his arguments on petitioner Kamienski's culpability for narcotics violations rather than intentional involvement in murder does not, of course, have any legal affect. The State did not dismiss or abandon the murder charges and, if the evidence legally supports the conviction, the jury's verdict must be upheld.

accomplice liability even absent evidence of an agreement necessary to support a conspiracy verdict. Petitioners recognize that "jury verdicts finding defendants not guilty as conspirators but guilty as accomplices are not necessarily inconsistent. . . ." (Pb at 44.) *See Nye & Nissen v. United States,* 336 U.S. 613, 619-620 (1949) (holding "[i]t is clear that failure to prove a conspiracy among A, B and C does not preclude a conviction on a count that A aided Y in committing a substantive offense."). The Appellate Division's reversal on this ground, therefore, was not contrary to, nor an unreasonable application of, federal law.

As to petitioners' arguments regarding the propriety of the jury instruction on accomplice liability, the Court notes that, "[a]s a general rule jury instructions do not form a basis for *habeas corpus* relief." *Williams v. Lockhart,* 736 F.2d 1264, 1267 (8th Cir. 1984). Indeed, jury instruction issues are normally matters of state law and are not cognizable in federal *habeas corpus* review. *Henderson v. Kibbe,* 431 U.S. 145 (1977); *Chance v. Garrison,* 537 F.2d 1212 (4th Cir. 1976); *Manning v. Rose,* 507 F.2d 889 (6th Cir. 1974); *Grecco v. O'Lone,* 661 F. Supp. 408, 412 (D.N.J. 1987). Only where the giving of an instruction is so prejudicial as to amount to a violation of due process and fundamental fairness will a *habeas corpus* claim lie. 28 U.S.C. § 2254(a).

As the Appellate Division pointed out, the jury instructions with respect to accomplice liability were proper. Petitioners argue Judge Persekie's instruction

that someone can become an accomplice before, during, or after the commission of the crime charged as long as the action that is taken as an accomplice is done with the purpose of promoting, facilitating, making easier or making possible, the commission or completion of the crime, was improper. (Pb at 38 (citing 20T at 59:7-66:2; 78:4-79:9.)) Petitioners appear to argue it was error to instruct that someone can become an accomplice after the commission of a crime. (*Id.*) As the Appellate Division noted, however, Judge Perskie instructed the jury, with respect to accomplice or conspiratorial liability for robbery, that:

> [T]he State would have to show that Alongi and Kamienski had the purpose of furthering or promoting the crime of robbery so that they would have to be aware of the fact of the crime of robbery and their conduct before or during the fact would have to be undertaken by them with the purpose of promoting the crime of robbery.

Kamienski, 254 N.J. Super. at 91-92. It appears, therefore, that if the Judge indeed instructed the jury that petitioners could have become accomplices after the fact, it was cured through a subsequent express instruction. Moreover, viewing the jury instructions as a whole, rather than a statement by the judge in isolation, the Court finds that the Appellate Division's reversal did not constitute an unreasonable application of federal law.

For all of the foregoing reasons, the Court holds that petitioners are not entitled to a writ of *habeas*

corpus based on their theory that evidence was insufficient to sustain the guilty verdicts.

C. Jury Selection

Petitioners claim that the Appellate Division's rejection of petitioners' argument that the jury selection process violated their Sixth and Fourteenth Amendment rights "involved an unreasonable application of clearly established Federal law . . . and failed to extend a legal principle from Supreme Court Precedent." (Pb at 49-61, Point III.) Petitioners challenge two aspects of jury selection: the voir dire process, and the method of exercising juror challenges.[8]

The Court notes that petitioners fail to cite Supreme Court caselaw that contradicts the way the trial judge conducted the jury selection (and, therefore, the Appellate Division's affirmance). Petitioners cite Supreme Court caselaw for the general propositions that (1) the right to an impartial jury is guaranteed by the Sixth Amendment through the Fourteenth Amendment, *Turner v. Murray,* 476 U.S.

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[8] The State argues that the only arguments raised before the Appellate Division were petitioners' arguments that the judge conducted improper voir dire and the sequential method of peremptory challenges was unfair because they could not properly evaluate which juror to challenge. (Opp. Br. at 107.) The Court is satisfied, however, based on the record, that the issues presented here were sufficiently exhausted before the Appellate Division. (*See* 148a-164a; 321a-324a.)

28, 36 n.9 (1986); *voir dire* enables the court to select an impartial jury and assists counsel in exercising peremptory challenges, *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991); courts should enforce a jury qualification method that promotes the exclusion of jurors infected with the prejudice of the community from which they come, *Groppi v. Wisconsin*, 400 U.S. 505, 509-510 (1971); and due process requires a jury capable and willing to decide a case solely on the evidence before it "and a judge ever watchful to prevent prejudicial occurrences and determine the effect of such occurrences when they happen," *Smith v. Phillips*, 455 U.S. 209, 217 (1982). They have not, however, cited established federal law that proscribes the complained of jury selection method or supports their arguments that it violated the Sixth or Fourteenth Amendments. Indeed, petitioners concede that the jury selection method is a matter generally left to the discretion of the trial court. (Pb. at 57-58.) This overarching deficiency in the petition warrants a denial of the relief sought. The Court now turns to petitioners' arguments.

i. *Voir Dire*

With respect to the *voir dire* process, petitioners argue (1) the *voir dire* took only three hours, making petitioners unable to develop sufficient information to intelligently exercise peremptory challenges or challenge for cause (Pb. at 50); (2) prospective jurors were permitted to answer *voir dire* questions in the presence of other jurors, rather than at side bar,

exposing the rest of the jury to prejudicial information about pre-trial publicity and the jurors' personal experiences with people who have abused drugs, which was openly discussed before the pool of potential jurors (*id.* at 50-52); and (3) the trial judge failed to adequately administer an instruction to cure the prejudice from the jurors' *voir dire* answers (*id.* at 52-53). The Appellate Division held that the exposure of the entire jury to the *voir dire* process of certain jurors did not violate petitioners' right to a fair trial. *Id.* at 109-110. The trial judge referred to the "educational process" of jury *voir dire*, which assists the parties in obtaining a fair and impartial jury. *Id.* at 109 (citing *State v. Rios,* 17 N.J. 572, 586-89 (1955)). For the following reasons, the Court finds this was not an unreasonable application of federal law.

First, the judge adequately reminded the jury of the presumption of innocence and the State's obligation to prove guilt beyond a reasonable doubt. (*See, e.g.,* 3T at 27:5-28:9; 29:17-21; 29:23-30:4; 45:6-21.) The Court finds that these efforts insured against any prejudice that conceivably could have arisen from the *voir dire* process and, thus, weigh against a finding that the trial court's methods violated petitioners' rights to an impartial jury.

Second, it appears that the judge questioned the jurors as to whether or not they were capable of impartiality and that the attorneys had an opportunity to suggest *voir dire* questions. *Cf. U.S. v. Addonizio,* 451 F.2d 49, 65-66 (3d Cir. 1971) (holding trial court did not err in denying counsel the opportunity to

examine prospective jurors, or in not examining each prospective juror individually out of the presence of the rest of the panel as to the content of articles he or she had read; the level of participation of counsel complied with the relevant rule, and choice of questions submitted by counsel was within trial court's discretion). Indeed, petitioners do not dispute the Appellate Division's findings that the jury was asked all pertinent questions suggested by counsel, and the trial judge was satisfied that the jurors who deliberated were fair and impartial. *See Kamienski,* 254 N.J. Super. at 110. The Court, therefore, does not find the trial court's involvement of the attorneys, the length of the *voir dire*, or the practice of questioning the jurors in open court to constitute an unreasonable application of federal law. These are discretionary matters and the trial court's exercise of its discretion here did not unreasonably impinge upon petitioners' Sixth or Fourteenth Amendment rights.

Lastly, the petitioners argue the trial judge, and the Appellate Division through its affirmance, unreasonably applied federal law in allowing the open-court *voir dire* of jurors regarding their personal experiences with people who have abused drugs. Petitioners recognize, however, that the method of voir dire generally a matter left to the discretion of the trial judge. (Pb. at 57-58.) Moreover, the objected-to colloquy between the trial judge and the jurors did not relate to the petitioners, but rather to the personal experiences of prospective jurors. The Court acknowledges that this was in part a drug trial and

the personal experiences discussed were drug-related. However, the Court agrees with the Appellate Division that the prospective jurors' responses to *voir dire* questions regarding personal experiences with drug abuse reflect "the reality of the society in which we live today." *Kamienski,* 254 N.J. Super. at 109. The jurors were not questioned as to whether or not they have ever read or heard anything about other people's experiences with drugs, nor could that reasonably form the basis for a for cause strike. The personal reasons for the excused jurors' partiality does not present a significant risk of tainting the remaining jurors; indeed, their excusal arguably educated the jury about the importance of impartiality.

ii. Peremptory Challenges

With respect to the method of exercising juror challenges, petitioners argue requiring a sequential method forced them to exercise challenges against a partially filled jury box, which violated their Sixth and Fourteenth Amendment right to an impartial jury. (Pb. at 53-56.)

The Court adopts in large part the reasoning of the Appellate Division with respect to petitioners' argument that the sequential method of administering peremptory challenges violated their Sixth Amendment Rights. The method at trial went as follows:

> [A] one-for-one alternating method was followed in this case. Sequential rotation was

> followed which permitted each defendant to pass after a challenge by the State or co-defendant. In that way it amounted to one defense challenge to one challenge by the State while the other defendants were free to pass.

Kamienski, 254 N.J. Super. at 112.

The Court finds this ground for relief unpersuasive, first and foremost, because federal law recognizes that the jury selection process is largely within the sound discretion of the trial court. Indeed, petitioners fail to cite any binding caselaw that prohibits a "sequential" jury selection method such as the one used in petitioners trial. Rather, they cite a range of circuit court opinions that recognize the discretion of the trial court but suggest methods other than the sequential method. (Pb. at 58-59.) Based on this authority, the Court is unsatisfied that the jury selection employed by the trial court was contrary to or constituted an unreasonable application of federal law. *See Mu'Min,* 500 U.S. at 430-31 (holding "[t]he fact that a particular rule may be thought to be the 'better' view does not mean that it is incorporated into the Fourteenth Amendment."). The Court therefore agrees with the State that the method of jury selection is a matter left to the discretion of the trial judge. The Court's efforts to exercise that discretion did not constitute an unreasonable application of federal law.

Moreover, the trial court's purported error apparently resulted in no harm to petitioners whatsoever.

Petitioners argue their right to a fair trial was violated because the trial court required them to exercise peremptory challenges during a round of challenges after one of their co-defendants challenged a juror but before that excused juror's seat was filled. They argue this forced their attorneys to waste a challenge on a seated prospective juror that it would rather have used against someone that subsequently filled an empty seat. After 28 rounds of peremptory strikes, however, petitioners had not exhausted all of their challenges. *See Kamienski,* 254 N.J. Super. at 111. It is immaterial, therefore, whether or not petitioners exercised their challenges without knowing who might occupy an empty seat because petitioners ultimately knew who occupied that empty seat and chose not to strike them. Thus, the trial court and the Appellate Division did not unreasonably apply or misconstrue federal law in violation of petitioners' Sixth or Fourteenth Amendment rights.

For all of these reasons, the Court is unconvinced that the jury selection process involved an unreasonable application of clearly established Federal law or failed to extend a legal principle from Supreme Court Precedent. The petition is therefore denied on this ground.

D. *Brady-Giglio* Materials

Petitioners claim their Due Process rights were violated by the State's failure to disclose *Brady-Giglio*[9] material. (Pb. at 62-69, Point IV.) Petitioners argue the State failed to disclose an agreement, or informal understanding, between it and Donna Duckworth that, in return for her testimony in the murder trial, she would receive concessions on an unrelated drug charge to which she pled guilty. (Pb. at 67.) Alternatively, they argue there was an agreement that if she did not testify, the State would seek incarceration rather than probation which was mentioned to her as a likely outcome in her case when she pleaded guilty. (*Id.*)

The first basis for petitioners' April 10, 1997 motion for Post-Conviction Relief ("PCR") arose from concessions in connection with a prior arrest that Duckworth allegedly received in exchange for her testimony against Alongi and Kamienski. In October 1985, Ms. Duckworth and Mr. Kamienski were arrested and charged with possession and possession with intent to distribute CDS. (545a; 593a.) Ms. Duckworth retained attorney Joel Miklacki. (545a-546a;595a-601a.) On or about February 19, 1986, Mr.

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[9] *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that prosecution's suppression of accomplice's confession violated due process); *Giglio v. United States*, 405 U.S. 150 (1972) (holding that a new trial was required because the government had not revealed a promise it made to its principal witness that he would not be prosecuted).

Micklacki informed Duckworth that her application for admission into Pre-Trial Intervention ("PTI") had been rejected. (602a-603a.) On July 22, 1987, Ms. Duckworth pled guilty to the two charges in exchange for the prosecution's withdrawal of a civil forfeiture action and dismissal of the indictment against Kamienski. On July 26, 1990, however (after she testified in petitioners trial), Ms. Duckworth was permitted to withdraw her guilty plea and, with the consent of the Ocean County Prosecutor's Office, was permitted to enter into PTI. (639a-644a.) Petitioners argued this chronology shows that Duckworth received concessions in exchange for her testimony and that the prosecution had never disclosed such an agreement. (*See* 536a-555a.)

Petitoners' April 10, 1997 PCR motion was denied. (745a.) Petitioners appealed, contending they had made a showing that the State had suppressed *Brady-Giglio* material, especially since the State had never denied any agreement with Duckworth in a sworn document. (378a-428a.) The Appellate Division stated "it is a fair inference, however, that discussions between the State and Duckworth's counsel must have occurred." (514a.) The court stated:

> We are persuaded that the State's answer to the PCR application, *See R.* 3:22-9, should have included affidavits or certification from representatives of the State with personal knowledge of the events in question.

(514a.) The court vacated the denial of the vacatur motion and remanded the matter to permit the State to file certifications that include:

> an explanation of the circumstances surrounding the July 1990 concessions to Duckworth, their rationale and their relationship, if any, to her trial testimony, including whether they were the result of any promises to her.

(514a.)

On remand, then-prosecutor E. David Millard, who was the prosecutor for both petitioners and Duckworth in her unrelated drug case, submitted a certification that recounted the murder indictment, the unrelated drug charge, Duckworth and Kemienski's denial of PTI for the unrelated drug charge, Duckworth's July 22, 1987 guilty plea to possession of a CDS with intent to distribute, and the likelihood that she would receive probation given her lack of a criminal record. (751a-752a.) He further certified as follows:

> 7. In September, 1987 and prior to sentencing, Duckworth left her boyfriend Paul Kamienski in Florida and came up to New Jersey. It was at this time that she told investigators the truth about her knowledge of the De Tourney murders and how she too had been threatened by the Defendants if she didn't keep her mouth shut.
>
> 8. At no time did I make any promises, deal or otherwise induce Ms. Duckworth to testify

> against Kamienski and Alongi. I further am unaware of any deals, or promises made by anyone else to induce Dona [sic] Duckworth to testify.
>
> 9. On October 7, 1987 defendants Kamienski, Alongi and Marseino were indicted by an Ocean County Grand Jury for the September 19, 1983 murder of Henry and Barbara De Tourney. Duckworth had not yet been sentenced on the drug offense arising out of the pills found on Kamienski's boat. Sentencing of Duckworth had been adjouned by the court after the homicide indictment.

(752a.) Prosecutor Millard then recited the procedural history of petitioners' case, including the trial before Judge Perskie that spanned six weeks in October and November of 1988, Judge Perskie's December 21, 1988 grant of petitioners' acquittal N.O.V., and the ensuing motions and appeals that occurred over the next three and one-half years. (752a-753a.) He further certified:

> 14. In the middle of this appeals process, in or about June or July of 1990 we became aware that the Duckworth drug case was still pending sentence. As the trial attorney on the case, I agreed to Duckworth's entry into P.T.I. This decision was not based on any deal or prior agreement. Rather, on balance in the interests of justice, I believed it was the just course of action. Over the course of the prosecution we had come to understand the extent to which Kamienski had

> dominated and used Duckworth. I felt she was in a sense a victim of the overall situation. Accordingly, a consent Order was entered and Duckworth, with the recommendation of the PTI authorities, was permitted to enter PTI.

In response, petitioners argued the certification was inadequate and that the Appellate Division's order required certifications or affidavits from more than one person. After hearing oral argument, the Superior Court denied the petition without an evidentiary hearing. (505a.) Petitioners appealed (429a-493a), the Appellate Division affirmed the trial court (795a-806a), and the New Jersey Supreme Court denied certification.

The principles of *Brady v. Maryland*, 373 U.S. 83 (1963), protect a defendant's right to due process by requiring a prosecutor to disclose material exculpatory evidence to the defense. Failure to do so, regardless of whether or not the omission was intentional, entitles defendant to a new trial. The "prosecutor's" obligation to disclose extends to "any favorable evidence known to the others acting on the government's behalf in the case, including the police," *Kyles v. Whitley*, 514 U.S. 419, 438-39 (1995), and "exculpatory" evidence may include impeachment evidence, such as cooperation agreements. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

The Supreme Court has described the materiality requirement to *Brady* evidence as follows:

> [The] touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles, 514 U.S. at 434 (quoting *United States v. Bagley,* 473 U.S. 667, 678 (1985)). The Court must, therefore, determine whether or not the state court properly applied federal law in its ruling regarding the alleged *Brady* materials.

First, this is not a case of failure to turn over evidence that bears on the credibility of the State's witness, Duckworth. Rather, petitioners draw inferences from the timing of Duckworth's sentencing with respect to her testimony in the murder trial. Based on those inferences, they appear to seek to investigate the veracity of the prosecutors' representations regarding whether or not Duckworth received anything in exchange for her testimony and the reason for their consent to PTI. Thus, there has been no showing of a failure to disclose materials in derogation of *Giglio v. United States.* For this reason, the Court does not find that the trial court or the Appellate Division's refusal to require the prosecutors to prove the non-existence of such an agreement

through, for example, an evidentiary hearing was an unreasonable application of federal law. The requirement that the prosecutor's office provide a certification was a reasonable safeguard to petitioners' right to a fair trial under the standards set forth in *Giglio*.

Second, the Court is satisfied that the trial court did not unreasonably apply federal law when it found that prosecutor Millard's certification satisfied the Appellate Division's Order. The certification asserts that prosecutor Millard did not make any deals with Duckworth, and that he was not aware of any such deals by anyone else. Petitioners claim that a prosecutor's representation that he was "unaware of any deals, or promises made by anyone else to induce Dona Duckworth to testify" left open the possibility that someone besides Millard made a deal with her. They argue this is insufficient to satisfy *Brady* and *Giglio*. While the Court recognizes that the duty to disclose *Brady* materials extends beyond the individual prosecutor, *Kyles*, 514 U.S. at 438-39, it also notes that Prosecutor Millard's certification affirmatively explains the reason for his agreement to allow Duckworth to enter PTI. He stated that his concession "was not based on any deal or prior agreement," but on his knowledge of the extent to which Duckworth was dominated by petitioner Kamienski and that she "was in a sense a victim of the overall situation." (753a.) Given this affirmative statement regarding the genesis of the prosecutors' concession – namely, information obtained through the murder trial investigation – the Court finds the

state court's treatment of the certification to be consistent with *Brady* and *Giglio*.

Third, Duckworth testified on direct examination that the State did not make her any promises or "any representations . . . in any fashion" regarding her plea on the unrelated drug charge. Defendant had ample opportunity to cross examine her in this regard. The only support for petitioners' theoretical deal between Duckworth and the prosecutors' office is the timing of her sentencing, i.e., after her testimony. The Appellate Division recognized that the timing required at least a sworn explanation by the prosecutors' office, which was provided. Beyond the affirmative explanation of the prosecutor's office's concessions, petitioners do not produce sufficient evidence to raise cause for concern. For this further reason, the Court is persuaded that the state court reasonably upheld the tenets of *Brady* and *Giglio* in adjudicating petitioners' applications regarding this issue.

E. Kamienski's Severance and Mistrial Applications

Petitioner Kamienski claims the denial of his severance and mistrial applications violated his right to a fair trial. (Pb at 70-79, Point V.) Kamienski argues these rulings violated the dictates of *Bruton v. United States*. First, Kamienski argues that, pursuant to *Bruton*, the trial court's redaction of certain statements made in a September 9, 1983 telephone

conversation prejudiced him. Second, he argues the trial court improperly admitted evidence regarding Kamienski's "lifestyle," including recreational drug use and his tumultuous relationship with Duckworth. He argues this Court should hold that the state court, while correct that the indictment supported a joint trial, failed to protect his right to a fair trial as events of the trial unfolded as required by *Schaffer v. United States,* 362 U.S. 511, 516 (1960). (Pb. at 78-79.)

Kamienski moved to sever the trial on both these issues and the trial court denied his motions. The Appellate Division addressed his arguments regarding severance as follows:

> Finally, the trial judge did not abuse his discretion in denying Kamienski's motion for a severance. *State v. Brown,* 118 N.J. 595, 603, 573 A.2d 886 (1990). Based on the allegations in the indictment, a joint trial was clearly appropriate. *State v. Moore,* 113 N.J. 239, 273, 550 A.2d 117 (1988).

Kamienski, 254 N.J. Super. at 115. Since the Appellate Division did not appear to apply the principles of *Bruton v. United States,* 391 U.S. 123 (1968) to petitioner's argument, the Court will apply the pre-AEDPA standard of review in considering petitioner's arguments here, *see Marshall v. Hendricks,* 307 F.3d 36 (3d Cir. 2002).

In *Bruton v. United States,* the Supreme Court held "that, because of the substantial risk that the jury, despite instructions to the contrary, looked to

the incriminating extrajudicial statements in determining petitioner's guilt, admission of [a co-defendant's] confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." 391 U.S. at 126. In discussing the basis for this holding, the Supreme Court in *Richardson v. Marsh,* 481 U.S. 200 (1987) stated:

> Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness "against" a defendant if the jury is instructed to consider that testimony only against a codefendant. This accords with the almost invariable assumption of the law that jurors follow their instructions, *Francis v. Franklin,* 471 U.S. 307, 325, n. 9, 105 S.Ct. 1965, 1976, n. 9, 85 L.Ed.2d 344 (1985), which we have applied in many varying contexts. For example, in *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), we held that statements elicited from a defendant in violation of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), can be introduced to impeach that defendant's credibility, even though they are inadmissible as evidence of his guilt, so long as the jury is instructed accordingly. Similarly, in *Spencer v. Texas,* 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967), we held that evidence of the defendant's prior criminal convictions could be introduced for the purpose of sentence enhancement, so long as the jury was

> instructed it could not be used for purposes of determining guilt.

481 U.S. at 206-07. *Bruton* recognizes the prejudice that could befall defendants when a facially incriminating confessions of a nontestifying codefendant is introduced at their trial at their joint trial, even where the jury is instructed to consider the confession only against the codefendant. The *Bruton* Court stated

> there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial
>
> . . . .

391 U.S. at 135-36 (citations omitted).

In *Richardson,* however, the Supreme Court limited Bruton's reach and specifically declined to apply it to a codefendant's confession that did not directly implicate the defendant, but which required an evidentiary link. The court reasoned that "[w]here the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence."

Richardson, 481 U.S. at 208. The *Richardson* court, therefore, limited *Bruton* to confessions of codefendants that directly implicate the defendant.

i. The September 9, 1983 Telephone Conversation

Before trial, the trial court ruled that six statements would be admitted into evidence subject to redaction of any references to non-declarant defendants. One of the statements was attributed to Kamienski by Donna Duckworth. She testified about a September 9, 1983 telephone conversation that occurred when Nick DeTournay called Kamienski from Kamienski's boat. She stated Kamienski told DeTournay that "he didn't have a scale [to weigh drugs] and to get off the boat." (10T at 34:20-25.) Kamienski stated he was angry because someone was on his boat while he was not there. (13T at 230:19-23.) Originally, the statement included a reference to co-defendant Alongi that suggested he was also on Kamienski's boat with DeTournay during the call (9T at 85:7-9) but the trial court ordered that the reference to Alongi be deleted (2T at 204:4-206:16).

Kamienski argues that the redaction of a reference to Alongi being on his boat prejudiced him at trial. Duckworth testified that the blankets, sleeping bag, and towel that she either saw on the boat behind Alongi's house on September 19, 1983, or which were found with the DeTournays' bodies when they were recovered from Barnegat Bay and Sedge

Island, were similar to those she had seen on Kamienski's boat. (11T at 62:25-64:17; 69:10-72:8.) The inference is that Kamienski, and not someone else, brought the towel, blanket, and sleeping bag from his boat to the boat behind Alongi's house to wrap the bodies. At trial, Kamienski's argued the redaction of the reference to Alongi being on the boat prohibits him from rebutting this inference with evidence that others had access to Kamienski's boat and, therefore, could have taken the blankets and towel. (9T at 84:13-16; 85:10-23.) The trial court denied the application. (9T at 98:1-5.) Kamienski argues that the state court's treatment of the September 9, 1983 statement rendered his trial "fundamentally unfair."

In *Zafiro v. United States*, 506 U.S. 534 (1993), the Supreme Court held there is no "bright line" rule regarding whether or not to sever a trial. The *Zafiro* court did, however, offer the following guiding examples:

> For example, evidence of a co-defendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. . . . Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. *See Bruton v. United States*. . . . Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial.

506 U.S. at 539. Petitioner essentially argues that the trial court's exclusion of the statement containing the reference to Alongi being on his the boat on September 9, 1983 was unreasonable because it included evidence exculpatory to Kamienski – namely, evidence that someone else could have obtained the blankets that were implied to have been used to wrap the DeTournays' bodies. (Pb. at 76-78.)

The Court first notes that petitioner's arguments do not go to the state court's application of *Bruton,* but rather the denial of his motion for a severance, a decision widely regarded as within the sound discretion of a trial judge. *See, e.g., U.S. v. Hart,* 273 F.3d 363, 370 (3d Cir. 2001) (citing *Zafiro* and holding "[w]hether to sever a trial is left to the sound discretion of the district courts."). The petitioner appears to argue, however, that the denial of his severance motions, coupled with the state court's ruling redacting the Duckworth statement, rose to the level of a constitutional violation. In particular, he argues that, contrary to the teachings in *Zafiro,* the redaction of Duckworth's testimony excluded his exculpatory declarations that Alongi was on the boat with Nick DeTournay at the time of the September 9, 1983 telephone conversation and, thus, had access to the boat and the towel and blankets. The plaintiff argues an inference could be drawn from the suppressed statement that others had access to Kamienski's boat and, therefore, the blankets that it was implied at trial were used to wrap the DeTournays' bodies were obtained by someone else.

However, the redacted reference to Alongi is not of the type that would so prejudice Kamienski that severance was required to preserve his right to a fair trial. Kamienski's trial testimony directly contradicts the allegedly exculpatory statement he made to Duckworth. He did not testify the blankets and towel were his but were obtained from his boat by someone else. Rather, he testified that the blankets *were not from his boat.* (18T at 210:22-211:4.) Thus, the theory that he now seeks to advance to rebut the inference that they were from his boat, is wholly inconsistent with his own testimony. In short, petitioner apparently chose not to argue that the blankets were his but could have been taken from his boat by someone else.

Moreover, Kamienski had ample opportunity to develop the theory that even if the blankets were from his boat, someone else may have taken them. Indeed, he was asked, and permitted to answer, whether or not Nick DeTournay told him during the September 9, 1983 telephone call who was with him on Kamienski's boat. The colloquy went as follows:

> Q. [Prosecutor] Let me ask you one other question about that phone call that you got back up in Garfield regarding the scale. Did Nick tell you who was with him?
>
> MR. RUSSELL: Objection, your honor.
>
> THE COURT: Overruled.
>
> A. No, he did not.

(19T at 52:11-24.) Kamienski also testified that others had access to his boat. (19T at 47:6-9.) Nothing in the record indicates that he could not have further developed a theory that someone else could have taken blankets from his boat. Thus, the absence of the redaction coupled with the denial of Kamienski's motions for severance did not render the trial "fundamentally unfair."

For these reasons, the Court finds that the state court's redaction of the Duckworth statement and the denial of Kamienski's severance motions were not inconsistent with, or an unreasonable application of, *Bruton* or *Zafiro*.

ii. The "Lifestyle" Testimony

Kamienski further argues that testimony by Duckworth and Arthur "Buddy" Lehman concerning Kemienski and Duckworth's lifestyle together was improper. Specifically, Kamienski argues he was unfairly prejudiced by reference to his almost nightly "partying" with Duckworth, his absentee management of his family's lucrative New Jersey-based funeral business, their casual lifestyle in Florida and on Kamienski's boat, an incident in which Kamienski allegedly threatened Duckworth with a knife in a New Jersey casino, and Kamienski's drug use and socializing with Buddy Lehman. (Pb. at 74-75.) Admission of this testimony, and denial of Kamienski's related motions for a mistrial, he argues, was contrary to *United States v. Socony-Vacuum Oil Co.*,

310 U.S. 150, 239 (1940) which held that appeals to class prejudice based on the accused's lifestyle are improper and may prejudice his or her right to a fair trial. (Pb. at 78-79.) The State argues that everything elicited by the prosecutor on cross examination was brought forward by Kamienski on direct. (Opp. Br. at 121.) In this regard, the State references (19T at 26:15-26:18 – regarding the issue of money and income) and (19T at 19:4-13 – regarding the issue of drugs).

The Appellate Division summarily rejected petitioner's contention, finding it "completely without merit." *Kamienski,* 254 N.J. Super. at 115. It noted that "[w]e have examined the record with care respecting the prosecutor's conduct and find that he did not exceed the parameters of 'permissibly forceful advocacy' established by decisional law." *Id.* (citations omitted.)

The denial of Kamienski's motion for a mistrial, and the Appellate Division's affirmance, were consistent with *Saucony-Vacuum* and, therefore, did not violate the AEDPA. The purportedly prejudicial statements here were not as severe as the statements that the Supreme Court found to have been relatively benign in the *Saucony-Vacuum* case. Moreover, petitioner points to no such impassioned argument in the state's opening or closing that incorporates testimony regarding Kamienski's income and drug use. Moreover, the Court sees no "undignified and intemperate" use of the "lifestyle" information and finds that

any "lifestyle" testimony elicited during the cross-examination of Kamienski's did not amount to an appeal to class prejudice. In short, Kamienski's trial was not "dominated by passion and prejudice." *Saucony-Vacuum,* 310 U.S. at 238. Thus, the Court finds that the state courts' treatment of this issue was not contrary to, or an unreasonable application of, federal law. The petition is, therefore, denied on this ground.

F. Effectiveness of Petitioner Alongi's Counsel

Alongi argues he was deprived of counsel because (1) his application for counsel due to indigency had been denied and appealed but did not receive a decision in time to have made a difference (Pb. at 82); (2) he had filed motions that were never decided (*id.*); (3) his counsel, Miles Feinstein, Esq. was disqualified just before trial, requiring him to use a "surrogate" attorney – Jack Russell, Esq. (*id.*); and (4) petitioner Alongi argues Mr. Russell filed no pretrial motions that were decided by the trial court, he "botched" a bail reduction hearing, failed to participate in side-bar conferences, and failed to prepare a post-verdict motion for Judgment of Acquittal (*id.* at 82-83). He argues the Appellate Division, in affirming the denial of his PCR motion on this ground, "unreasonably

failed to extend the legal principals of *Strickland* to cover this case." (*Id.* at 81.)[10]

In *Strickland v. Washington,* 466 U.S. 668, 687 (1984), the Supreme Court held that a petitioner seeking to have his conviction overturned for ineffective assistance of counsel under the Sixth Amendment must show that (1) his counsel was defective, and (2) his defense was prejudiced by this defective performance. *See also Carpenter v. Vaughn,* 296 F.3d 138, 149 (3d Cir. 2002).

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[10] The Court has further considered several letters by petitioner Alongi, including a May 15, 2003 letter, a June 24, 2004 letter, and an undated letter "For: Corrective Procedural History and Supplementary Permission" (the "Supplemental Submission"), which he submitted to supplement the ineffective assistance of counsel argument in the petitioners' joint brief. In the Supplemental Submission, Alongi argues (1) he told his appellate counsel to argue all of his points, including ineffective assistance of counsel, and the Appellate Court's decision did not discuss his arguments (*id.* at 6); (2) he was not present at a case management conference and a hearing and that attorney Miles Feinstien, Esq., who attended a recusal hearings, falsely represented that he had an attorney-client relationship with Alongi (*id.* at 9-10); and (3) when Alongi proceeded *pro se,* the trial court did not undertake to advise him of the perils he faces in represent himself (*id.* at 10-11); and (3) Jack Russell, Esq., the successor to attorney Feinstien, was "a fraudulent lawyer" (*id.* at 16-17) who did not proceed with each of the numerous motions and serve the 15 subpoenas that Alongi wished to be served (*id.* at 19) or properly investigate the case (*id.* at 19-20). The Court has further considered the counter-arguments by the State as set forth in their appellate brief, which is located in their appendix at R6, pages 40-46.)

The first prong of *Strickland* requires a showing that counsel made errors "so serious that [he] was not functioning as the 'counsel' guaranteed the defendant by the sixth amendment." *Strickland,* 466 U.S. at 687. To obtain relief, petitioner must show that counsel's assistance fell below an objective standard of reasonableness considering all the circumstances. *Id.* at 687-88.

The second prong of *Strickland* requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 692. Under this component, a petitioner must show "that there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A petitioner need not show that, but for counsel's deficiency, an alternative outcome would have "more likely than not," but rather he must show "a probability sufficient to undermine confidence in the outcome." *Id.* at 693-94. This standard is "not a stringent one." *Jacobs,* 395 F.3d at 105 (quotations omitted).

There is a strong presumption that defense counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland,* 466 U.S. at 690. To succeed in this application, petitioner Alongi must overcome this presumption and establish, *inter alia,* that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Stated differently, a prisoner seeking habeas relief must "affirmatively establish[ ] the likelihood of an unreliable verdict." *McAleese v. Mazurkiewicz,* 1 F.3d 159, 166 (3d Cir. 1993).

While Alongi's petition raises several complaints about the way he was represented during the pretrial and trial phases of the state case, he fails to cite any specific prejudice. Indeed, after the trial, petitioner Alongi was granted a judgment of acquittal. He makes no mention of deficiencies by appellate counsel, who represented him before the panel that reversed his judgment of acquittal and reinstated the guilty verdict. He has made no showing that but for counsel's failures the outcome would have been different. Thus, he does not meet the second element of the *Strickland* analysis because he has not demonstrated that any of the complained of conduct by counsel prejudiced him. For this reason, petitioner Alongi's application based on ineffective assistance of counsel is denied.

IV. CONCLUSION

For all of the foregoing reasons, the petitioners' application for writ of *habeas corpus* pursuant the

AEDPA, 28 U.S.C. § 2254(d), is **DENIED**. Appropriate Orders will follow.

Dated: July 25, 2006 /s/ Stanley R. Chesler
United States
District Judge

603 A.2d 78

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Paul KAMIENSKI, Defendant-Appellant.
STATE of New Jersey, Plaintiff-Respondent,
v.
Anthony ALONGI, Defendant-Appellant.
STATE of New Jersey, Plaintiff-Appellant,
v.
Joseph MARSIENO (Marzeno) a/k/a Michael Testa;
Anthony Alongi; and Paul Kamienski,
Defendants-Respondents.
STATE of New Jersey, Plaintiff-Respondent,
v.
Joseph MARSIENO (Marzeno) a/k/a Michael Testa;
Anthony Alongi; and Paul Kamienski,
Defendants-Appellants.
Argued Sept. 12, 1991.
Decided Feb. 19, 1992.

Richard E. Mischel, for appellants-respondents, Paul Kamienski and Anthony Alongi (Greenberg, Margolis, attorneys; Richard E. Mischel on the brief for Paul Kamienski; Anthony Alongi filed a pro se brief).

Samuel J. Marzarella, Asst. County Prosecutor, for respondent-appellant, State of New Jersey (James W. Holzapfel, Prosecutor of Ocean County, attorney; Samuel J. Marzarella, of counsel; Samuel J. Marzarella, Francis Rodman Rupp, Asst. County Prosecutor, on the brief).

Wilfredo Caraballo, Public Defender, attorney for appellant-respondent Joseph Marsieno (Marzeno), a/k/a Michael Testa (Kevin G. Byrnes, Designated Counsel, of counsel and on the brief).

Before Judges J.H. COLEMAN, BILDER and STERN.

The opinion of the court was delivered by

COLEMAN, J.H., P.J.A.D.

These appeals raise two significant issues: (1) whether an unsequestered jury *voir dire* or the use of sequential rotation methodology in the exercise of peremptory challenges precluded a fair trial, and (2) whether an acquittal on a conspiracy to rob and to murder precluded a conviction on those substantive offenses as an accomplice. We hold that under the facts, the jury selection process did not preclude the impanelling of a fair and impartial jury. We also hold that where a jury is instructed properly, an acquittal under a theory of conspiracy does not as a matter of law preclude a conviction as an accomplice.

Defendants were tried jointly under a theory that they conspired and acted as accomplices in one or more schemes (1) to obtain cocaine with the intent to distribute it, (2) to rob the drug dealers of the cocaine rather than pay for it, and (3) to murder the drug dealers to avoid retaliation by drug lords. Each defendant was convicted of the five counts submitted to the jury. The trial judge granted judgments of acquittal notwithstanding the verdicts (j.n.o.v.) on

three counts as to two of the defendants. The State has appealed from the j.n.o.v. and each defendant has filed a separate appeal. We now consolidate the four appeals and issue a single opinion. We reverse the j.n.o.v., affirm the verdicts of the jury and reinstate those verdicts except that the two conspiracies must be merged into a single conspiracy and the felony murders must merge with the knowing or purposeful murders.

I. PROCEDURAL HISTORY

Defendants Paul Kamienski, Anthony Alongi and Joseph Marzeno were tried under five counts of Ocean County Indictment No. 692-10-87. Two additional counts charging only Marzeno with capital murders were dismissed approximately two months before the trial commenced. All three defendants were tried for the knowing or purposeful murders of Henry DeTournay and his wife Barbara DeTournay, contrary to *N.J.S.A.* 2C:11-3a(1) and (2) (Counts One and Two); felony murders[1] of Henry and Barbara DeTournay, contrary to *N.J.S.A.* 2C:15-1 and *N.J.S.A.* 2C:11-3a(3) (Count Five); conspiracy among the defendants between August 1, 1983 and April 30, 1984, in Ocean County and the State of Florida, to commit the crimes of possession of cocaine with

[1] Although the felony alleged under Count Five was robbery, the State did not indict either defendant separately for robbery. Two felony murders were charged under a single count, Count Five.

intent to distribute, in violation of *N.J.S.A.* 24:21-19a, and/or robbery in the first-degree, in violation of *N.J.S.A.* 2C:15-1, and/or murder, in violation of *N.J.S.A.* 2C:11-3 and *N.J.S.A.* 2C:5-2, (Count Six); and conspiracy with each other, Henry and Barbara DeTournay and Sidney Jeffrey, II, who were unindicted co-conspirators, between August 1, 1983, and April 30, 1984, to possess cocaine with intent to distribute, contrary to *N.J.S.A.* 2C:5-2 and *N.J.S.A.* 24:21-19a(1) (Count Seven). The jury was asked to decide whether there were one or two conspiracies at one time or at different times.

Marzeno was tried as the person who knowingly or purposefully caused the death of Henry DeTournay under Count One and Barbara DeTournay under Count Two. He was also tried for being the person who caused the deaths of the DeTournays during the commission of a robbery of cocaine under Count Five. Alongi and Kamienski were tried as accomplices and/or conspirators to Marzeno in the commission of the murders. The State contended that the victims were robbed of cocaine and then murdered to prevent Columbian drug lords from seeking revenge.

At the conclusion of an 18 day trial which ended on November 18, 1988, the jury found each defendant guilty under Counts One, Two, Five and Seven. The jury found Marzeno guilty as the principal and Kamienski and Alongi as accomplices of Marzeno under the two counts charging knowing or purposeful murders and the felony murders count. Under Count Six, the jury also found each defendant guilty of

conspiracy to possess cocaine with intent to distribute, but not guilty of conspiracy to murder and to rob.

Prior to sentencing, the trial judge heard a motion for a new trial or in the alternative for the entry of j.n.o.v. The trial judge entered j.n.o.v. in favor of Kamienski and Alongi for the two murders and the felony murders under Counts One, Two and Five. Kamienski was then sentenced on Count Six to a custodial term of 12 years with four years of parole ineligibility. On Count Seven, he was sentenced to a consecutive custodial term of 12 years with six years of parole ineligibility. A total fine of $50,000 was imposed. His aggregate sentence is 24 years with 10 years of parole ineligibility. Kamienski filed his notice of appeal on December 30, 1988 under A-2350-88T5.

Alongi was sentenced on Counts Six and Seven to consecutive custodial terms of 12 years with six years of parole ineligibility on each count and a total fine of $50,000 was imposed. His aggregate sentence is 24 years with 12 years of parole ineligibility. Alongi filed his notice of appeal on January 26, 1989, under A-3611-88T5. The State filed its appeal from the j.n.o.v. on April 3, 1989, under A-3689-88T5.

Marzeno was sentenced on Counts One and Two to consecutive life terms with 30 years of parole ineligibility on each count. The felony murders under Count Five were merged with Counts One and Two. He was sentenced on Counts Six and Seven to consecutive 12 year custodial terms with six years of parole ineligibility on each count. His aggregate

sentence was double life plus 24 years with 72 years of parole ineligibility. Marzeno filed a notice of appeal on February 1, 1989, under A-3946-88T5.

While the four appeals were pending, defendants filed a second motion for a new trial based on their assertion that subsequent to the sentencing, it came to their attention that one of the trial jurors, Angela Metta Krebs, failed to disclose a social relationship with one of the State's key witnesses, Jean Calabro Yurcisin. We remanded the matter temporarily for a judge to conduct an *in camera* interview with the juror. An interview was conducted by a judge who did not preside over the trial. He denied the motion on December 22, 1989, because he found the two women were not acquainted.

Marzeno's appeal was dismissed by consent on February 5, 1991, because of his death. We entered an order on February 28, 1991, permitting Kamienski and Alongi to adopt Points II through VIII raised in Marzeno's brief.

In its appeal, the State raises the following contentions:

I THERE WAS NO INCONSISTENCY IN THE VERDICTS RETURNED BY THE JURY; ALTERNATIVELY INCONSISTENT VERDICTS DO NOT VITIATE AN OTHERWISE REASONABLE VERDICT, THEREFORE THE TRIAL JUDGE'S FINDING THAT FACTS EXISTED CONSISTENT

WITH CRIMINAL LIABILITY SHOULD BE UPHELD.

II THERE EXISTS EVIDENCE BEYOND A SCINTILLA AND VIEWED FAVORABLY TO THE STATE, THAT DEFENDANTS ALONGI AND KAMIENSKI WERE PROPERLY FOUND GUILTY BY THE JURY AS ACCOMPLICES TO MURDER.

III DEFENDANTS WERE PROPERLY FOUND GUILTY BY THE JURY ON FELONY MURDER AS ACCOMPLICES TO A ROBBERY AND THE JUDGMENT OF ACQUITTAL SHOULD BE REVERSED.

Kamienski raises the following issues in his appeal:

I DEFENDANT KAMIENSKI'S FEDERALLY AND STATE GUARANTEED RIGHTS TO A FAIR TRIAL BY AN IMPARTIAL JURY WERE VIOLATED BY THE JURY SELECTION PROCESS.

II THE COURT ERRONEOUSLY DENIED DEFENDANT KAMIENSKI'S SEVERAL APPLICATIONS TO SEVER HIS TRIAL FROM HIS CO-DEFENDANTS' TRIAL.

III DEFENDANT KAMIENSKI'S FEDERALLY AND STATE GUARANTEED RIGHTS TO A FAIR TRIAL WERE VIOLATED BY THE ERRONEOUS ADMISSION OF INFLAMMATORY EVIDENCE, UNDUE RESTRICTIONS PLACED ON THE CROSS-EXAMINATION OF A STATE'S WITNESS,

THE OUTBURST OF ANOTHER STATE'S WITNESS DURING HER CROSS-EXAMINATION, AND THE ERRONEOUS ADMISSION OF CO-DEFENDANT MARZENO'S STATEMENT.

IV DEFENDANT KAMIENSKI'S FUNDAMENTAL RIGHTS TO A FAIR TRIAL WERE VIOLATED BY SEVERAL REMARKS MADE BY THE PROSECUTOR DURING HIS SUMMATION. (SOME ISSUES RAISED WERE NOT RAISED BELOW).

V THE COURT ERRONEOUSLY DENIED DEFENDANT KAMIENSKI'S SEVERAL APPLICATIONS TO MERGE COUNTS SIX AND SEVEN OF THE INDICTMENT BOTH OF WHICH CHARGED CONSPIRACY TO POSSESS COCAINE WITH INTENT TO DISTRIBUTE.

VI DEFENDANT KAMIENSKI'S APPLICATION, ON REMAND, FOR A NEW TRIAL SHOULD BE REMANDED AGAIN FOR FURTHER PROCEEDINGS.

VII DEFENDANT KAMIENSKI JOINS AND ADOPTS CO-DEFENDANTS ARGUMENTS.

VIII DEFENDANT KAMIENSKI'S TWO CONSECUTIVE TWELVE YEAR TERMS OF IMPRISONMENT, WITH PERIODS OF PAROLE INELIGIBILITY OF SIX YEARS AND FOUR YEARS, WERE EXCESSIVE AND SHOULD BE REDUCED.

In his *pro se* brief, Alongi raises the following contentions:

I INEFFECTIVE ASSISTANCE OF COUNSEL THROUGH GOVERNMENT INTERFERENCE.

II DUPLICITY OF THE CONSPIRACIES CAUSE OF DOUBLE JEOPARDY AND DOUBLE COUNTING, TO: VACATE JUDGMENT OF CONVICTION AND OR TO MERGE INTO A SINGLE CONSPIRACY.

III GRAND JURY TAINTED THROUGH GOVERNMENT INTERFERENCE.

IV SUPPLEMENT AND AMENDMENT TO: LIMITED REMAND OF PETIT JUROR ANGELA (METTA) KREBS, AND IMPROPER PETIT JUROR SELECTION.

In a brief filed on behalf of Marzeno, the following issues were raised and have been adopted by Kamienski and Alongi:

II THE JURY SELECTION PROCESS VIOLATED DEFENDANT'S RIGHT OF DUE PROCESS.

III THE DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED; THE TRIAL COURT ERRED IN ITS INSTRUCTION ON PRINCIPAL-ACCOMPLICE LIABILITY.

IV THE DEFENDANT WAS UNDULY RESTRICTED IN EXERCISING HIS RIGHT OF CROSS-EXAMINATION.

V THE TRIAL COURT IMPROPERLY INVOKED A PRIVILEGE ON BEHALF OF A STATE'S WITNESS.

VI THE TRIAL COURT IMPROPERLY ADMITTED UNDULY PREJUDICIAL PHOTOGRAPHS OF THE HOMICIDE VICTIMS.

VII THE PROSECUTOR EXCEEDED THE BOUNDS OF FAIR PLAY. (PARTIALLY RAISED BELOW).

VIII DEFENDANT MARZENO'S APPLICATION, ON REMAND, FOR A NEW TRIAL SHOULD BE REMANDED AGAIN FOR FURTHER PROCEEDINGS.

II. GENERAL FACTS

On September 24, 1983, the body of Henry DeTournay, 33, was recovered from Barnegat Bay in Toms River, New Jersey. The following day the body of his wife, Barbara DeTournay, 39, also was recovered from Barnegat Bay, approximately one mile east from where her husband's body was found. Henry's body was wrapped in a blue sleeping bag, a rust colored blanket and a rose pattern towel. Barbara's body was wrapped in a rust colored blanket. Both bodies were weighted down with 16-inch cement blocks and the same type rope was used to secure both bodies.

Autopsies performed on September 26, 1983, revealed that Henry was shot three times, had a postmortem fracture of the skull and marks on his

neck indicating attempted manual strangulation. Barbara was shot seven times. The victims were killed with a 9mm automatic weapon. Investigators discovered the telephone numbers of defendants Kamienski and Alongi inside Henry's wallet which was found with his body. Also found inside the wallet were directions to Alongi's house, located in Toms River. Although the DeTournays lived in Miami, Florida, they were on a long term visit to New Jersey in September 1983. After an extended investigation, an indictment was filed against the defendants on October 4, 1987.

In September 1983, Marzeno lived in Island Heights, New Jersey. From September 1983 until February 1984, Jean Calabro Yurcisin was his friend and companion. During the summer of 1983, Yurcisin worked as a waitress at the Top O' The Mast restaurant in South Seaside Park, New Jersey. Marzeno, Alongi, Alongi's girlfriend-wife, Kamienski and Kamienski's girlfriend dined at the Top O' The Mast restaurant on several occasions during the summer and fall of 1983.

Alongi, age 61, was a Toms River real estate businessman. He lived on Baron Street which bordered on a lagoon that enters Barnegat Bay. Alongi had extensive use of a boat which he docked in a marina behind his house. He married his girlfriend, the former Jackie Sullivan, shortly before the trial in this matter. During the trial, some witnesses described Alongi as a distinguished looking man who did not use cocaine, but was involved in its

distribution for profit. Alongi met Kamienski in the spring of 1983 when he showed him condominiums which were for sale in the Toms River area.

Kamienski, age 43, was president of his family's business, Kamienski's Funeral Home. From 1981 until 1987, Kamienski lived in an apartment above the family's Garfield, New Jersey funeral home with his girlfriend, Donna Duckworth, age 28. From time to time they also lived on Kamienski's boat, the Foreplay III, docked at Ocean Beach Marina in Lavallette, New Jersey, and in Stuart, Florida, where Kamienski owned a car dealership. According to Duckworth, the couple spent about "24 hours a day" together, and they "partied almost every night" by using cocaine and speed. Kamienski supplied the drugs he and Duckworth consumed. Duckworth first met Alongi and Marzeno on Kamienski's boat during the summer of 1983. Kamienski bought cocaine from Alongi and Marzeno and they socialized with them nearly every day after the first meeting. During the summer of 1982, Kamienski and Duckworth met Barbara and Henry DeTournay at Ocean Beach Marina when their boats were docked in adjoining slips. The couples socialized and used cocaine together.

It was the State's contention during the trial and on appeal that the events which led to the murders began during the Labor Day weekend (September 3-5) of 1983 when Barbara and Henry DeTournay spent the weekend in Newark with Barbara's parents, Barbara's sister, Christine Longo, and her husband

Leonard. The DeTournays left Newark to spend time on Kamienski's boat and to negotiate a drug deal. On September 11, the DeTournays arranged to have their drug courier bring three kilos of cocaine to them in Toms River.

Christine Longo testified that when the DeTournays returned to Newark, Barbara told her that they had slept on Kamienski's boat down the shore after a party. Christine said Barbara was happy because the drug deal they were in the process of negotiating would make them "set for life." On September 17, Henry received a telephone call at the home of his in-laws. Henry then left the house and used a public telephone located just outside his in-laws' home. Telephone records show that a phone call was made from that public telephone on September 17, 1983 to Alongi at 2:40 p.m. When Henry returned to the house, he told Barbara to pack their belongings as they had to go to the Jersey Shore. Henry said they were leaving because "I got something big. I got something real big going." The DeTournays left Newark on September 17 shortly after receiving another phone call that evening. Telephone records indicate a second phone call was made from the public phone in Newark to Alongi at 8:01 p.m. When they left Newark, Henry said, "Come on Barb, this is it." That was the last time the family saw the DeTournays alive.

During the days following September 17, Christine received several telephone calls from Sidney Jeffrey, II, looking for the DeTournays. He was

the drug courier for the DeTournays and he feared they had ripped him off. Jeffrey testified for the State, and in exchange for his testimony, the State agreed not to charge or prosecute him for his involvement.

Jeffrey testified that before the 1983 Labor Day weekend, he brought 12 ounces of cocaine from Florida to the DeTournays in Toms River, New Jersey. He was the courier because Henry looked like a hippie and would attract too much attention. On September 11, 1983, the DeTournays arranged for Jeffrey to bring three kilos of cocaine to Toms River. On September 17, Jeffrey called Henry in Newark and informed him that he had arrived in Toms River with the cocaine and that he was staying at the Holiday Inn. Henry arranged to meet Jeffrey at the Holiday Inn on September 18. This was to be the first delivery of a plan to deliver three kilos of cocaine per month to Toms River. The arrangement was for the DeTournays to pay him $50,000 per kilo and he would deduct $5,000 per kilo for himself and deliver the balance to his Columbian drug lords.

Late in the day on September 18, Henry informed Jeffrey that the deal could not be finalized that day because the buyers were having trouble getting the money together. The transfer was postponed until 6:00 p.m. on September 19 at which time Henry was to drop Barbara off at the Holiday Inn and return for her after the buyers produced the money.

When Barbara arrived at the Holiday Inn, she told Jeffrey there had been another change in plans. The change was that Henry would not return for her because he would be counting the money. Instead, a "very distinguished looking man," fitting Alongi's description, would be picking her up. Barbara left the hotel at 5:00 p.m. with the three kilos of cocaine after she recognized the expected car pull into the parking lot. Jeffrey's description of the car fits the description of a car owned by Alongi. He saw Barbara enter the car and he watched it head east (in the direction of Alongi's house). That was the last he ever saw either the DeTournays or the cocaine.

The State relied heavily upon testimony presented by Kamienski's girlfriend, Donna Sue Duckworth; the girlfriend of Marzeno, Jean Calabro Yurcisin; George Hunt, Alongi's neighbor; Arthur Lehman, a drug user; and several other witnesses to establish the drug conspiracies and to establish how, when and where the victims were killed as well as to establish the participation of the defendants. The details of some of that testimony will be discussed later. Based on the total evidence, the State argued to the jury that the killings occurred at Alongi's house when Marzeno shot the victims and that all three defendants participated in one way or another as accomplices and/or as conspirators in the commission of the robbery, the murders and in disposing of the bodies.

III. STATE'S APPEAL

First we will consider the State's appeal from the j.n.o.v. Defendants Alongi and Kamienski filed their first motion for a new trial under *R.* 3:20-1, or in the alternative for the entry of a judgment of acquittal pursuant to *R.* 3:18-2. Defense counsel argued that the verdicts were inconsistent and that the evidence was insufficient to support a conviction. The judge based his decision on his recollection of part of his instruction to the jury which he concluded was erroneous even though counsel did not urge that as a basis for relief. The judge also concluded that the verdict of the jury finding Alongi and Kamienski not guilty of conspiracy to rob or to murder the DeTournays precluded a guilty verdict based on accomplice liability. The State contended below and on this appeal that the jury was instructed properly. It is beyond dispute that correct jury charges are essential to a fair trial and that an erroneous charge on a material point is presumed to be reversible error. *State v. Grunow,* 102 *N.J.* 133, 148, 506 *A.*2d 708 (1986).

The judge concluded that his jury instructions required a new trial on Counts One, Two and Five under *R.* 3:20-1. But because he found the evidence was insufficient to sustain a verdict, he granted j.n.o.v. on those counts. The decision that a new trial was required and the granting j.n.o.v. requires us to focus first on the pertinent aspects of the jury charge to see if there was error. This task is complicated by the fact that neither the trial judge nor the briefs

submitted in these appeals have identified where in the record the alleged error in the charge occurred. *See R.* 2:6-4(a).

We begin with the general instruction to the jury that it could consider the conduct of each defendant which occurred before the crimes, during the commission of the crimes and after the commission of the crimes when determining whether Alongi and Kamienski were guilty as conspirators and/or as accomplices. *Maybe* this general instruction led the judge to conclude, based on his faulty recollection, that he erroneously instructed the jury "that the act of disposing of the bodies could be considered by them as an act with purpose to promote or facilitate the commission of the crimes of murder." It was the judge's faulty recollection that he instructed the jury "in effect that if they believed defendants [Alongi and Kamienski] participated in the disposition of the bodies, they could be charged with the murders and felony murders as accomplices." Believing that he had improperly instructed the jury, the judge found that his charge:

> [P]ermitted the jury to consider the actions of defendants Alongi and Kamienski in disposing of the bodies as a basis for accomplice status in and of themselves, rather than as merely evidence from which inferences could be drawn as to the purpose of the conduct by the two of them before or during the robbery and murders.

The record does not support the judge's perception that there was error in the charge.

Notwithstanding the fact that the judge found that his error required a new trial, he declined to grant a new trial because he concluded that even if there was no error in the charge, the State's evidence was insufficient to support a conviction under Counts One, Two and Five as to Alongi and Kamienski. Thus a j.n.o.v. was entered pursuant to *R.* 3:18-2 rather than granting a new trial.

A. Jury Instruction

The jury was instructed that, under the indictment and the evidence, the State contended that Marzeno was the triggerman who killed the DeTournays and that Alongi and Kamienski acted as accomplices and/or as conspirators. The jury was instructed further that for either one to be an accomplice, he must act with the purpose of promoting or facilitating the substantive crime of robbery, murder or felony murder regardless of whether the conduct under scrutiny occurred before, during or after the crime. The jury was instructed that the mere presence of Alongi and Kamienski at the scene of the robbery and killings was *not sufficient* to convict, but such circumstances could be considered in conjunction with all the other evidence.

In fact, the judge followed the model jury charge and instructed the jury that:

I've mentioned already that the action that an accomplice takes has to be with a purpose of promoting or facilitating the crime in question. I've already explained to you what purpose means, conscious object. That is someone who is said to be an accomplice is said to have, must be shown to further the crime of murder. Again, whether before or during or after the actual killing. Mere presence at or near the scene of a crime does not make one a participant in the crime as an accomplice or otherwise. Nor does the failure of a spectator to interfere make a person a participant. It is, however, a circumstance that may be considered together with the other evidence in determining whether the person was present as an accomplice, but presence is not, in itself, conclusive evidence of that fact. Whether presence has any probative value, whether it's important, depends upon the total circumstances. To constitute guilt as an accomplice there must exist a community of purpose and actual participation in the crime.

Community of purpose and actual participation. What that means is that they must have been acting together with the same purpose to commit or to further the commission of the crime of murder. While mere presence at the scene of the perpetration of a crime does not render, by itself, does not render a person a participant in the crime, prove that somebody is present at the scene of the commission of a crime without

> disapproving or opposing it is evidence from which, in connection with all other circumstances, it is possible for a jury to infer that the person assented or agreed to the crime, lent to it his countenance and approval, and was thereby aiding or abetting the crime. It depends upon the totality of the circumstances as those circumstances appear from all of the evidence. However, one cannot be held to be an accomplice unless you find as a fact that at the time he was an accomplice he possessed the same criminal state of mind, that is, the purpose to commit or facilitate the crime of murder that is required to be proved against the person who actually committed the crime itself.

The jury was instructed that the State could prove the elements of accomplice liability through direct and circumstantial evidence. The court defined circumstantial evidence by stating:

> [C]ircumstantial evidence is evidence that allows you, if you choose to, to draw a conclusion from this fact that another fact exists. The law does not require that anything that has to be proved in a case be proved by direct evidence or by circumstantial evidence, it can be proved by either or both in combination.

In an effort to explain to the jury how one could become criminally responsible as an accomplice or as a coconspirator in a felony murder where robbery is the felony, the judge used three hypothetical

examples. The second example given involved a bank robber who stopped an unsuspecting motorist for a ride to an airport. The hypothetical motorist had no knowledge of the robbery until he was flagged down. The robber entered the car and told the motorist "I just robbed that bank, I got to get away, take me to the airport will you?" The motorist rushed the robber to the airport. Under that hypothetical scenario, the judge told the jury that the driver was chargeable as "being an accomplice and probably, also, a conspirator because even though there was no specific agreement other than what he does, what he did was he acted in a way that enabled me to complete the crime."

To make certain the instructions were complete and accurate and that the jury did not misunderstand or make an improper use of that hypothetical example, the judge informed the jury that:

> [T]he State would have to show that Alongi and Kamienski had the purpose of furthering or promoting the crime of robbery so that they would have to be aware of the fact of the crime of robbery and their conduct before or during the fact would have to be undertaken by them with the purpose of promoting the crime of robbery. Keep in mind the example of the guy driving away. If he drives away knowing that he's helping the bank robber get away, and having that as his purpose, he's guilty as an accomplice or as a conspirator. If, on the other hand, he acts in the same fashion but doesn't know, and doesn't intend that his conduct or his agreement to

> act are designed to help somebody commit the robbery, then he's not guilty as an accomplice or as a conspirator.

Additionally, the jury was instructed that knowledge, purpose and intent refer to a person's mental state which:

> may be inferred from what someone does or says or the specific circumstances in which they act. So that's the kind of evidence that you will need to use with respect to the deciding what someone's purpose was or someone's knowledge was at a specific point of time. You have to look at what they do and what they say and the circumstances in which they do it, and from that you would draw conclusions about what they knew or what they intend at any given time.
>
> * * *
>
> It is within the power of the jury to find that proof of purpose or proof of knowledge has been furnished beyond a reasonable doubt by inferences which may arise from the nature of the acts and circumstances surrounding the acts under investigation. Such things as the place where the act occurred, . . . , all that was done or said by the defendant preceding, connected with, immediately succeeding or following the events leading to the death of the victims are among the circumstances to be considered.

We are persuaded that the judge erred in granting the j.n.o.v. First, the charge did not contain

an error. Second, even the perceived portion "of a [jury] charge alleged to be erroneous cannot be dealt with in isolation but the charge should be examined as a whole to determine its overall effect." *State v. Wilbely,* 63 *N.J.* 420, 422, 307 *A.*2d 608 (1973). *See also State v. Marshall,* 123 *N.J.* 1, 135, 586 *A.*2d 85 (1991); *State v. Ramseur,* 106 *N.J.* 123, 280, 524 *A.*2d 188 (1987). This is so because it is not possible for the judge to state all the law in one simple concise sentence. *State v. Hipplewith,* 33 *N.J.* 300, 317, 164 *A.*2d 481 (1960). Considering the jury instructions in their entirety, we conclude that the jury was not informed that it could convict Alongi or Kamienski of murder based solely on helping to dispose of the bodies. Indeed, the charge always clearly informed the jury it was obligated to consider all the evidence and the surrounding circumstances in deciding whether Alongi and Kamienski aided or assisted Marzeno in robbing and killing the DeTournays and whether they acted with the same purpose as did Marzeno. Consequently, we reverse the finding that a new trial was warranted under *R.* 3:20-1.

B. No Inconsistent Verdicts

We are also persuaded that a verdict of not guilty of a conspiracy to rob or to murder is not inconsistent with a verdict of guilty of felony murder based on a killing during the course of a robbery and murder as accomplices. The conspiracy statute under which defendants were found not guilty of conspiring to rob

or to murder, is *N.J.S.A.* 2C:5-2. It provides in pertinent part:

> a. Definition of conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime. [*N.J.S.A.* 2C:5-2].

In general, the aim in criminalizing conspiracies is to prosecute the agreement itself, thus punishing jointly planned criminal activity quite apart from any underlying offense involved in the conspiracy. *State v. Hardison,* 99 *N.J.* 379, 383, 492 *A.*2d 1009 (1985); *see State v. Stefanelli,* 78 *N.J.* 418, 428-429, 396 *A.*2d 1105 (1979). The gist of a conspiracy is the "actual agreement for the commission of the substantive crime . . . [and] one may be liable as [an accomplice] even though no conspiracy existed between him and the immediate perpetrator of the substantive crime." *State v. Madden,* 61 *N.J.* 377, 394, 294 *A.*2d 609 (1972); *see State v. La Fera,* 35 *N.J.* 75, 86, 171 *A.*2d 311 (1961). "The agreement is an advancement of the intention which each has conceived in his mind; the

mind proceeds from a secret intention to the overt act of mutual consultation and agreement." *State v. Carbone,* 10 *N.J.* 329, 337, 91 *A.*2d 571 (1952). To establish an agreement, the State was obliged to prove there was a meeting of the minds of the parties "in an understanding way with the single design to accomplish a common purpose. . . ." *Martin v. United States,* 100 *F.*2d 490, 495 (10th Cir.1938), *cert. denied,* 306 *U.S.* 649, 59 *S.Ct.* 590, 83 *L.Ed.* 1047 (1939).

To be sure, the agreement need not be formal or express. *United States v. Zang,* 703 *F.*2d 1186, 1191 (10th Cir.1982), *cert. denied,* 464 *U.S.* 828, 104 *S.Ct.* 103, 78 *L.Ed.*2d 107 (1983). An implicit or tacit agreement may be inferred from the facts and circumstances. *State v. Dennis,* 43 *N.J.* 418, 423, 204 *A.*2d 868 (1964); *State v. Yormark,* 117 *N.J.Super.* 315, 330, 284 *A.*2d 549 (App.Div.1971), *certif. denied,* 60 *N.J.* 138, 286 *A.*2d 511 (1972); *see also State v. Carbone, supra,* 10 *N.J.* at 341-342, 91 *A.*2d 571; *State v. Goodman,* 9 *N.J.* 569, 581, 89 *A.*2d 243 (1952).

Frequently, it is the most difficult task for a jury to determine whether an illicit agreement has been made and whether one acted in furtherance of the conspiracy. This is so, primarily, because "silence, furtiveness and secrecy shroud the conduct and speech of coconspirators." *State v. Phelps,* 96 *N.J.* 500, 509, 476 *A.*2d 1199 (1984) (quoting Note, "The Coconspirator's Expectation to the Hearsay Rule: Bootstrapping in the New Procedure from the First Circuit," 50 *U.Colo.L.Rev.* 93, 103-104 (1978)).

Therefore, the jury verdict that there was no conspiracy to rob or to murder quite conceivably resulted from a belief that the State failed to establish an illicit agreement. *See State v. Hardison, supra,* 99 *N.J.* at 383, 492 *A.*2d 1009. Beyond that, it is fundamental under our system of jurisprudence that a jury is free to reject one theory of liability under the evidence and accept another. *See State v. Ragland,* 105 *N.J.* 189, 204-213, 519 *A.*2d 1361 (1986); *State v. Ingenito,* 87 *N.J.* 204, 211-212, 432 *A.*2d 912 (1981); *State v. Cooper,* 10 *N.J.* 532, 569, 92 *A.*2d 786 (1952).

A finding of no conspiracy to rob or to murder does not legally preclude a guilty verdict on the murders and felony murders as accomplices of Marzeno under *N.J.S.A.* 2C:2-6. The subsections of this statute provide that a person is guilty of an offense if the offense is committed by his or her own conduct or by the conduct of another person when he or she is an accomplice of such other person in the commission of that offense. *N.J.S.A.* 2C:2-6a and 6b(3). An accomplice of another, as is pertinent to this case, is defined to be a person, who with "the purpose of promoting or facilitating the commission of the offense, . . . [s]olicits such other person to commit it; [a]ids or agrees or attempts to aid such other person in planning or committing it." *N.J.S.A.* 2C:2-6c(1)(a) and (b); *State v. Weeks,* 107 *N.J.* 396, 401-402, 526 *A.*2d 1077 (1987); *State v. White,* 98 *N.J.* 122, 128-129, 484 *A.*2d 691 (1984); *see State v. Bass,* 221 *N.J.Super.* 466, 486-487, 535 *A.*2d 1 (App.Div.1987), *certif. denied,* 110 *N.J.* 186, 540 *A.*2d 182 (1988); *State v. Gelb,* 212

N.J.Super. 582, 591, 515 *A.*2d 1246 (App.Div.1986), *certif. denied,* 107 *N.J.* 633, 527 *A.*2d 456 (1987).

Our accomplice liability statute delineates four ways one can become an accomplice, becoming part of a conspiracy is only one of the four. In view of the clear statutory language, the finding by the jury that Alongi and Kamienski acted as accomplices of Marzeno could be made independent of whether there was an illicit agreement. *State v. Madden, supra.* Because an illicit agreement was not required to establish accomplice liability under *N.J.S.A.* 2C:2-6a, 6b(3) and 6c(1)(a) and (b), and such an agreement was not an element of the substantive offenses of murder and felony murder, even inconsistent verdicts are permitted, so long as the evidence was sufficient to establish guilt on the substantive offenses beyond a reasonable doubt. *State v. Mangrella,* 214 *N.J.Super.* 437, 441-442, 519 *A.*2d 926 (App.Div.1986), *certif. denied,* 107 *N.J.* 127, 526 *A.*2d 194 (1987); *State v. Peterson,* 181 *N.J.Super.* 261, 266-267, 437 *A.*2d 327 App.Div.1981), *certif. denied,* 89 *N.J.* 413, 446 *A.*2d 144 (1982); *State v. Hawkins,* 178 *N.J.Super.* 321, 322-323, 428 *A.*2d 1322 (App.Div.), *certif. denied,* 87 *N.J.* 382, 434 *A.*2d 1066 (1981); *State v. Newell,* 152 *N.J.Super.* 460, 466, 378 *A.*2d 47 (App.Div.1977).

We are further persuaded that even though the jury found that the State failed to prove a conspiracy to rob or to murder, much of the evidence presented to establish such a conspiracy was also relevant to establish Alongi's and Kamienski's guilt as accomplices to Marzeno in the commission of the substantive

offenses of murders and felony murders. *See State v. Phelps, supra,* 96 *N.J.* at 516, 476 *A.*2d 1199; *State v. Louf,* 64 *N.J.* 172, 176, 313 *A.*2d 793 (1973); *State v. Farinella,* 150 *N.J.Super.* 61, 68-69, 374 *A.*2d 1229 (App.Div.), *certif denied,* 75 *N.J.* 17, 379 *A.*2d 248 (1977); *see also State v. Clausell,* 121 *N.J.* 298, 336-337, 580 *A.*2d 221 (1990). As accomplices, that evidence was limited to their individual conduct described in *N.J.S.A.* 2C:2-6c(1)(a) and (b) and the jury was told as much.

While mere presence at the scene of a murder does not make one a participant, *State v. Loray,* 41 *N.J.* 131, 139, 195 *A.*2d 289 (1963); *State v. Fox,* 70 *N.J.L.* 353, 355, 57 *A.* 270 (Sup.Ct.1904), unless there is a duty to act such as that discussed in *N.J.S.A.* 2C:2-1b(2) and *N.J.S.A.* 2C:2-6c(1)(c), direct or indirect participation in the commission of the criminal act where there is the shared purpose to achieve the criminal objective renders one guilty of the criminal act. *State v. Fair,* 45 *N.J.* 77, 95, 211 *A.*2d 359 (1965); *State v. Riley,* 28 *N.J.* 188, 196-197, 145 *A.*2d 601 (1958), *app. dismissed* and *cert. denied,* 359 *U.S.* 313, 79 *S.Ct.* 891, 3 *L.Ed.*2d 832 (1959); *State v. Wooters,* 228 *N.J.Super.* 171, 175-178, 549 *A.*2d 441 (App.Div.1988); *State v. Boyer,* 221 *N.J.Super.* 387, 402-403, 534 *A.*2d 744 (App.Div.1987), *certif. denied,* 110 *N.J.* 299, 540 *A.*2d 1280 (1988); *State v. Bass, supra,* 221 *N.J.Super.* at 486-487, 535 *A.*2d 1; *State v. Gelb, supra,* 212 *N.J.Super.* at 591, 515 *A.*2d 1246. An earlier observation by us is applicable to the present case:

> Although mere presence at or near the scene of the crime, or the failure to intervene, does not make one a participant in the crime, *presence at the commission of a crime without disapproving or opposing it is evidence which, in connection with other circumstances, permits the inference that he asserted [sic] thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same. State v. Newell, supra,* 152 *N.J.Super.* at 469 [378 *A.*2d 47] (Emphasis supplied) (citing *State v. Smith,* 32 *N.J.* 501, 521 [161 *A.*2d 520] (1960), *cert. den.*, 364 *U.S.* 936, 81 *S.Ct.* 383, 5 *L.Ed.*2d 367 (1961)). [*State v. Gelb, supra,* 212 *N.J.Super.* at 591, 515 *A.*2d 1246.]

C. Sufficiency of the Evidence

The State further argues that the evidence was sufficient to sustain the verdicts against Alongi and Kamienski. You will recall that the judge decided that even if the jury was instructed properly, the evidence was insufficient to sustain the verdicts and entered a j.n.o.v. as to Counts One, Two and Five pursuant to *R.* 3:18-2. In reaching that conclusion, the judge stated:

> The verdict acquitting defendants Alongi and Kamienski of the conspiracy to rob or to murder would preclude a retrial on the theory that they were chargable as principals for the murders or felony murders by reason of their *conspiracy* status. This would leave for retrial only the charge that these defendants were guilty of the murders and

felony murders as *accomplices*. There is not sufficient evidence to support such a verdict. While it can be argued that all of the conduct of defendants Alongi and Kamienski before the afternoon of the 19th is consistent with accomplice liability and the requisite purpose to promote or facilitate the crimes of robbery and murder, the verdict acquitting them of conspiracy to rob or to murder renders this theory untenable. If defendants Alongi and Kamienski did not conspire to commit these crimes, they could be charged therewith in a new trial only as accomplices *and only on the basis of their actions during the commission of the crimes*. There was no evidence of their conduct during the commission of the crimes except, inferentially, their presence at the scene, which would not by itself suffice to sustain a verdict. The State relies upon this inference to sustain the further inference that defendants Alongi and Kamienski assented to the robbery and murders, lent to the crimes their countenance and approval, and thereby are chargable therewith as accomplices. This latter inference, however, rests not upon any *evidence* of their presence at the scene of the crimes but upon the *inference* of their presence. Thus there does not appear to be sufficient evidence to establish the requisite purpose to promote or facilitate the crimes of robbery or murder, as opposed to the crime of possession of controlled dangerous substance with intent to distribute, in the conduct of defendants Alongi and Kamienski prior to or during the

meeting on the afternoon of the 19th. [Emphasis supplied].

The judge's reasoning contains several legal flaws. The first is that because the jury acquitted defendants Alongi and Kamienski of conspiracy to rob and to murder, that decision by the jury precluded a verdict based on accomplice liability. The second flaw is that only action taken by Alongi and Kamienski during the actual commission of the murders and felony murders was relevant to a determination of their guilt as accomplices. You will recall that we have previously explained the shortcomings related to these legal conclusions.

We reiterate that the jury was properly instructed that Alongi and Kamienski could be found guilty under the murder and felony murder counts as a conspirator and/or an accomplice of Marzeno based upon all the evidence presented. The jury was told it could base its verdict on either one but not necessarily on both. The jury was further instructed that the essential difference between the two is that a conspiracy involves an *agreement* between two or more people "to help or the agreement to assist or facilitate or to make it possible for . . . the planning or the commission of the crime."

In addition, the jury was further informed that "anybody who is a conspirator is always an accomplice. However, there are certain circumstances in which somebody could be an accomplice without necessarily being a conspirator." It must be presumed

that the jury followed the court's instructions. *State v. Perry,* 124 *N.J.* 128, 166, 590 *A.*2d 624 (1991). Under these proper instructions from the court, there was no valid reason why the jury was not permitted to consider all of the evidence presented, as to what transpired before, during and after the afternoon of the 19th in deciding whether Alongi and Kamienski were accomplices to Marzeno and whether they acted with the purpose to render assistance in furtherance of the robbery and the murders.

Considered in that context, we disagree with the judge's determination that the evidence was insufficient to establish Alongi's and Kamienski's guilt as accomplices to Marzeno beyond a reasonable doubt. Our role in evaluating the evidence is the same as the trial court's. The standard for determining the sufficiency of the evidence requires us to view all of the evidence, both direct and circumstantial, in a light most favorable to the State and to consider all reasonable inferences which reasonably could be drawn from that evidence. *State v. Brown,* 80 *N.J.* 587, 591-592, 404 *A.*2d 1111 (1979); *State v. Reyes,* 50 *N.J.* 454, 458-459, 236 *A.*2d 385 (1967). "[T]he veracity of each inference need not be established beyond a reasonable doubt in order for the jury to draw the inference." *State v. Brown, supra,* 80 *N.J.* at 592, 404 *A.*2d 1111; *State v. DiRienzo,* 53 *N.J.* 360, 376, 251 *A.*2d 99 (1969). The sufficiency standard has been satisfied if we are able to conclude that any "rational trier of fact could have found the essential elements of the crimes" of murder and felony murder beyond a

reasonable doubt. *Jackson v. Virginia,* 443 *U.S.* 307, 319, 99 *S.Ct.* 2781, 2789, 61 *L.Ed.*2d 560, 573, *reh'g denied,* 444 *U.S.* 890, 100 *S.Ct.* 195, 62 *L.Ed.*2d 126 (1979); *State v. Marshall, supra,* 123 *N.J.* at 136, 586 *A.*2d 85; *State v. Martin,* 119 *N.J.* 2, 8, 573 *A.*2d 1359 (1990); *State v. Brown, supra,* 80 *N.J.* at 592, 404 *A.*2d 1111.

Our careful study of the record, in light of the appropriate standard, satisfies us that there is no basis to conclude that the jury verdict on the murders and felony murders constituted a "manifest denial of justice." *R.* 3:20-1; *see State v. Martinez,* 97 *N.J.* 567, 571-572, 483 *A.*2d 117 (1984). "Concerted action [as an accomplice] need not be proved by direct evidence of a formal plan to commit a crime, which was verbally agreed to by all who were charged. Rather, the proof may be circumstantial and participation and acquiescence may be inferred from conduct, as well as spoken words." *State v. Gelb, supra,* 212 *N.J.Super.* at 591-592, 515 *A.*2d 1246 (citing *State v. Smith,* 32 *N.J.* 501, 522, 161 *A.*2d 520 (1960), *cert. denied,* 364 *U.S.* 936, 81 *S.Ct.* 383, 5 *L.Ed.*2d 367 (1961)).

KAMIENSKI'S INVOLVEMENT

The DeTournays knew Kamienski the longest. They met in the summer of 1982 when their boats were docked side-by-side in the Ocean Beach Marina. Kamienski's telephone and beeper numbers were found on the body of Henry DeTournay.

Kamienski was described as being a drug user who socialized with Alongi, Marzeno and their female companions. Kamienski supplied the cocaine he and his girlfriend Donna Sue Duckworth used.

Duckworth testified that Henry DeTournay visited Kamienski on Kamienski's boat on September 3, 1983, and asked if Kamienski knew anyone who wished to purchase a large quantity of cocaine. Kamienski bought some cocaine from Henry and indicated that he had friends who might be interested in such a deal. Later that night, after Henry left, Alongi and his then girlfriend, Jackie Sullivan, arrived at the boat.

Duckworth testified that on September 5, 1983, she, Kamienski and the DeTournays travelled in Kamienski's boat to a party at Alongi's house. Kamienski introduced Alongi to the DeTournays. Kamienski complied with Henry's request that he "vouch" for Alongi, and he also vouched for the DeTournays, at Alongi's request. Duckworth testified that as they pulled away in Kamienski's boat, she saw Marzeno arrive at Alongi's home. There is an inference that Kamienski became the broker who arranged with Alongi and Marzeno as persons who would purchase large amounts of cocaine from Henry.

Duckworth testified that while she and Kamienski were at Kamienski's Garfield apartment on September 9, 1983, Henry called. In response to phone conversations, Kamienski told Henry that he did not have a scale and "to get off the boat."

Duckworth said she and Kamienski returned to the Ocean Beach Marina later that day. Telephone records permit an inference that Kamienski called Henry at the home of Barbara's parents on September 9, 1983 at 10:38 p.m. On September 23, 1983, one day before the bodies were found, Kamienski called Alongi four times between 2:17 a.m. and 11:17 p.m.

When Barbara DeTournay and her husband Henry left her mother's home in Newark at the end of the 1983 Labor Day weekend, Barbara told her sister Christine that they were going to the Jersey Shore to spend time on Kamienski's boat. Dr. Fred Adams testified that he saw the DeTournays just before they went to Toms River to have a business meeting. The DeTournays told him they were broke and needed to sell some cocaine. When he saw them a few days later, they said their financial problems had been solved because they had met with a group of men, headed by a distinguished looking non-user of cocaine (fitting Alongi's description), who wanted to purchase a large amount of cocaine on a regular basis. After seeing Dr. Adams, Barbara and Henry DeTournay went back to Barbara's parent's home and told her sister Christine that they had slept on Kamienski's boat after a party at the Jersey shore. The DeTournays left Newark again on September 17 when Jeffrey, the drug courier or the "mule," called and told them he was at the Holiday Inn in Toms River with the three kilos of cocaine ordered by the DeTournays.

Kamienski and Duckworth attended a party on September 17, 1983 at Alongi's home at the shore. There was talk at the party that good quality cocaine would be coming into town soon through friends of Kamienski and Alongi. Marzeno and Alongi indicated at the party that the cocaine would be available on September 18 and promised Arthur Lehman he could get some of the kilo quality cocaine on the 18th.

Henry arranged to meet with Jeffrey at the Holiday Inn in Toms River to pick up and deliver the cocaine to the buyers on the 18th. Jeffrey and Henry had agreed that Henry would meet with the buyers first without the cocaine. Henry met with the buyers at about 11:30 a.m. on the 18th, and he did not take the cocaine. At that meeting the buyers informed Henry that they were having some difficulties getting the money together. The transfer was postponed until 3:00 p.m. on the 19th.

Kamienski was seen at the Holiday Inn on 18th at about 6:30 p.m. in the company of Marzeno and Alongi. Marzeno called Jean Yurcisin to pick him up from the Holiday Inn on the 18th. When she picked him up, he was carrying a briefcase which contained a gun but no money. Marzeno said the sellers wanted to see the money first but he had no intention of turning over any money to them and that he would kill them before they got any of his money. A reasonable inference can be drawn that Marzeno had planned to rob and maybe kill the DeTournays to obtain the cocaine on the 18th because he had only a gun in the briefcase and because he had promised to

obtain the cocaine on the 18th and to sell some to Lehman on the same day. But the Holiday Inn was rather public and Henry did not bring the drugs, so a scheme was devised to get Henry and Barbara to Alongi's home which was much more isolated.

On the 19th, Henry was seen at Alongis' home between approximately 3:00 p.m. and 5:00 p.m., the time Henry said he would be counting the money before producing the drugs. While the money was supposedly being counted, Barbara was waiting in Jeffrey's Holiday Inn room to be picked up with the cocaine. At approximately 6:00 p.m. to 6:15 p.m., Barbara left the hotel parking lot in a car, fitting the description of the one belonging to Alongi, which was being driven by a male. She carried the three kilos of cocaine in a green bag.

On the 19th, Kamienski drove his car to take Duckworth from his boat in Lavallette to visit her girlfriend Janet O'Donnell, in Seaside Heights to spend the day. He dropped her off at approximately 2:30 p.m., which was only 30 minutes before the drug deal was to be finalized. Duckworth regarded this conduct by Kamienski to be unusual because she and Kamienski were rarely apart and he never drove a car. His license was suspended.

Between 7:30 and 7:45 p.m. Kamienski picked up Duckworth from O'Donnell's house and drove directly to Alongi's house, a drive of about five minutes. By this time, the murders had already occurred. Upon their arrival at Alongi's house, Kamienski told

Duckworth to go upstairs to the kitchen to be with Jackie Sullivan. A reasonable inference can be drawn that because Duckworth had been present when Kamienski bought drugs in the past, Kamienski did not want Duckworth present this time because he was participating in much more than a drug sale and he did not want her to be an eye witness.

But Duckworth saw something anyhow. Shortly after being in the kitchen, Sullivan received a phone call and while Sullivan was on the telephone, Duckworth went down to the dock looking for Kamienski. She saw Kamienski standing on the dock near Alongi's boat looking toward the boat where Alongi was located. The dock was wet and appeared to have been hosed down recently. She observed what appeared to be two bodies: one was wrapped in what appeared to be a brown blanket and the other was wrapped in what appeared to be a sleeping bag. Alongi lunged for her as she got closer. Kamienski assured Alongi that Duckworth would not tell what she had seen. Duckworth and Sullivan were sent to the mall to purchase liquor.

Duckworth also testified that the towel and blankets found wrapped around the bodies were similar to ones she had seen on Kamienski's boat before the murders. The box in which the towel and blanket had been stored was moved from its usual place on the 19th. The bodies were tied with a hitch knot peculiar to the kind which Kamienski customarily made. The blanket and the hitch knot permit an inference that Kamienski lent assistance.

When Duckworth and Kamienski left Alongi's house the night of the 19th, Kamienski told her he could not control what happened. He said Henry was killed first and that Barbara did not suffer. Kamienski told Duckworth that if they did not stop talking about it, he would not be able to protect her or himself. Duckworth testified that Alongi and Kamienski later threatened her life. Duckworth stated that shortly after the bodies were discovered, Kamienski had her call Alongi before he was questioned by the police. Alongi called Kamienski twice before any questioning and 5 times in the next 6 days after the bodies were found.

Yurcisin testified that Marzeno shared the cocaine with Kamienski. Kamienski had a lot of good quality cocaine which he supplied to Duckworth. Shortly after the murders, Kamienski started looking for a grinder to make powder out of rock cocaine.

From the evidence presented including reasonable inferences to be drawn therefrom, the jury could have believed and in fact did find that Kamienski was part of a conspiracy to obtain drugs from the DeTournays. The jury could have believed that although Kamienski was not part of an agreement or conspiracy to rob the DeTournays of the drugs or to murder them, he did purposefully lend assistance and aid to Marzeno in the commission of the robbery and murders. It was up to the jury to determine the meaning and significance of Kamienski's conduct. His intent or purpose can be inferred from all that Kamienski did and/or said before, during and after

the robbery. A jury could reasonably infer that Kamienski used his friendship with Henry DeTournay to set up the drug deal and that he introduced him and vouched for him to Alongi and Marzeno. The jury could also infer that Henry had Kamienski's telephone and beeper numbers so he could always contact him about the impending drug deal Kamienski brokered.

The jury could infer that because Kamienski and Duckworth were always together, he needed to be free of her as a potential witness to what was to transpire when the drug deal was finalized. Kamienski was not with Duckworth between 2:30 and 7:30 or 7:45 p.m., at which time Kamienski took her to Alongi's home and told her to stay upstairs in the kitchen. The jury could have inferred that by prearrangement, Kamienski took steps to remove a potential eye witness from the scene of a robbery and murder and that his conduct constituted facilitating the commission of the crimes with the required shared intent or purpose. *See State v. Rivera,* 232 *N.J.Super.* 165, 174, 556 *A.*2d 1227 (App.Div.), *certif. denied,* 117 *N.J.* 169, 564 *A.*2d 885 (1989).

Under our law, even though Kamienski may not have been a party to the planning of the robbery, any purposeful or knowing participation in furtherance of the crime makes him guilty as an accomplice. We therefore conclude that under *Marshall, Brown, Reyes* and *Gelb,* the evidence against Kamienski was sufficient to warrant submitting the case to the jury on all of the charges. Circumstantial evidence need

not preclude every other hypothesis in order to establish guilt beyond a reasonable doubt. *State v. Mayberry,* 52 *N.J.* 413, 436, 245 *A.*2d 481 (1968), *cert. denied,* 393 *U.S.* 1043, 89 *S.Ct.* 673, 21 *L.Ed.*2d 593 (1969). A conviction may be based solely on circumstantial evidence if it is sufficient to generate a belief of guilt beyond a reasonable doubt. *State v. Papitsas,* 80 *N.J.Super.* 420, 424, 194 *A.*2d 8 (App.Div.1963).

ALONGI'S INVOLVEMENT

Based on the evidence mentioned up to this point, the jury could have found that Alongi was part of a conspiracy to obtain cocaine from the DeTournays and then distribute it, that he never intended to pay for his share of the cocaine, that he was aware that Marzeno intended to use a gun to rob the DeTournays of the cocaine and to kill Henry rather than pay for the cocaine, that he assisted further by allowing his home to be used as the rendezvous spot and that he gave directions to his house to Henry on the 18th when the date for the transfer of the drugs changed from the 18th to the 19th and the place was changed from the Holiday Inn to Alongi's home. Alongi's telephone number and directions to his house were found on Henry's body. Because Henry and Alongi were not social friends or drug buddies, Alongi required Kamienski to vouch for Henry.

The jury could also infer that Alongi not only permitted his house to be the scene of the robbery and murder, but that he escorted Henry into his

house under the pretext of counting the money before the cocaine was to arrive. There was strong evidence that he picked up Barbara from the Holiday Inn on the 19th and drove her to his house and that Henry and Barbara were murdered in his house while he was at home. During the course of the murders, the carpet in his garage was stained with blood necessitating a change in the carpet. An additional inference is that his boat was used to transport the bodies from the marina behind his house into the Barnegat Bay and that he dumped the bodies after attaching concrete blocks to them. Two or three days after dumping the bodies, Alongi referred to Marzeno as his partner while assuring Lehman that Alongi would be getting kilo quality cocaine. Alongi, a nonuser of cocaine, received a share of the cocaine without paying for it.

There was additional evidence that Alongi threatened Duckworth. Shortly after Duckworth and Sullivan returned from the mall, Alongi took Duckworth into one of his bedrooms. He pointed to a telephone with the label "Hit man." He then pointed to a gun in a drawer and told Duckworth that if she did not remain quiet about what she saw, she could end up dead like the DeTournays. He told her that if she talked, Kamienski would not be able to protect her.

We are persuaded therefore that viewing the evidence in its totality, direct and circumstantial and reasonable inferences to be drawn therefrom, any rational trier of fact could have found the essential elements of felony murder and murder by Alongi as an accomplice to Marzeno beyond a reasonable doubt.

The jury could have found that Alongi and Kamienski not only acted concurrently with Marzeno, but that they also shared his purpose.

As to Kamienski and Alongi, the trial judge erred when he concluded that their conduct in helping to dispose of the bodies could not be considered in determining whether they were accomplices to robbery, felony murder and murder. As we have pointed out, this is not a case where Alongi and Kamienski were only involved in disposing of the bodies. From the evidence, the jury was free to conclude that they were acting as accomplices of Marzeno on and even before the afternoon of the 19th. Based on that evidence, the jury was properly permitted to consider their conduct in helping to dispose of the bodies along with all the other evidence, including their conduct and spoken words shortly thereafter, in deciding whether they acted with purpose to facilitate the crimes of felony murder or murder. Simply because the conduct associated with disposing of the bodies may have violated a particular provision of the Code also, did not preclude the jury's consideration of that conduct as accomplices to felony murder and murder.

Under the State's appeal, we conclude that the trial judge erred in finding that his charge was erroneous. We also conclude that the evidence against Alongi and Kamienski was sufficient for any rational jury to find them guilty of felony murder and murders. Because the j.n.o.v. was entered pursuant to *R.* 3:18-2, principles of double jeopardy do not preclude reinstatement of the jury verdicts. *R.* 2:3-1(b)(3);

United States v. Scott, 437 *U.S.* 82, 90-91, 98 *S.Ct.* 2187, 2193-94, 57 *L.Ed.*2d 65, 74 (1978); *United States v. Martin Linen Supply Co.,* 430 *U.S.* 564, 570-571, 97 *S.Ct.* 1349, 1354-55, 51 *L.Ed.*2d 642, 650-651 (1977); *State v. Kleinwaks,* 68 *N.J.* 328, 331-337, 345 *A.*2d 793 (1975).

IV. DEFENDANTS' CHALLENGE TO JURY SELECTION

Alongi and Kamienski contend that the jury selection process violated their right to due process and deprived them of a fair trial. They contend the judge conducted an improper *voir dire* by allowing open court questioning of potential jurors in the presence of other potential jurors.

A.

Fourteen persons were first placed in the jury box. The *voir dire* of several jurors disclosed their personal experiences with family members involving drug abuse. These jurors were excused by the court. Potential jurors also explained their exposure to media accounts of the murders. They felt that because of the media accounts, they could not be fair and impartial and were also excused by the court. One potential juror stated that what he read four or five years before the trial started did not depict "a pretty picture." This juror was also excused by the court.

One of the defense attorneys summarized the objectionable statement by a potential juror seated in the box in this manner:

> And I think one of the most important problems was that jurors were permitted in open court to, in effect, bare their souls to the Court. We had a situation where one woman broke down and cried about the fact that she had a terrible situation in her family about drugs. We had another gentlemen who almost broke down because he had lost, I think he said he lost two relatives or two people as a result of drugs.
>
> Then there were three or four other people who got emotional about the issue of drugs, and started – and I don't know whether or not they were telling the truth. I am inclined to believe that some of them, as Your Honor indicated, were not telling the truth.
>
> I believe the old lady who broke down and the gentleman, the other gentleman who almost broke down, were telling the truth. A couple of other ones I don't believe, but I don't think it matters for the purpose of my argument.

R. 1:8-3(a) controls the examination of jurors: "For the purpose of determining whether a challenge should be interposed, the court shall interrogate the prospective jurors in the box after the required number are drawn without placing them under oath." Only in a death penalty case does the rule provide otherwise. Even though the rule was enacted in 1969,

it is silent as to whether the past practice of not sequestering a jury during *voir dire* in a non-capital case survived. *State v. Manley,* 54 *N.J.* 259, 255 *A.*2d 193 (1969), did not change that past practice. That past practice was articulated in *State v. Sullivan,* 43 *N.J.* 209, 239-240, 203 *A.*2d 177 (1964), *cert. denied,* 382 *U.S.* 990, 86 *S.Ct.* 564, 15 *L.Ed.*2d 477 (1966), which held that the decision whether to sequester a jury is discretionary with the trial judge. Similarly, *State v. Rios,* 17 *N.J.* 572, 586-589, 112 *A.*2d 247 (1955), rejected the idea of a mandatory sequestered *voir dire.* The *Rios* Court, as did the judge in the present case, recognized that an educational process occurs during jury selection in which potential jurors are made aware of the importance of a trial before a fair and impartial jury. *Id.* at 589, 112 *A.*2d 247. This educational process was given recognition recently in *State v. Moore,* 122 *N.J.* 420, 446, 585 *A.*2d 864 (1991).

Here, the judge instructed the jury several times that an educational process was occurring for the purpose of finding a fair and impartial jury. The open candor expressed by many prospective jurors is indicative of the fact that they too recognized the need for a fair and impartial jury. Even though their views were expressed from the jury box, the judge hammered home the point that the ultimate verdict had to be based on the evidence present during the trial.

The alleged damaging responses given by prospective jurors during the *voir dire* related to the experiences of family members with drug problems,

some of which were even fatal. But unfortunately, that is the reality of the society in which we live today. Even though we are satisfied the panel was not tainted, we recognize that the better practice is for the judge to inform the panel that if anyone has a personal reason why he or she cannot be fair and impartial in the case on trial, that person should come to the sidebar to inform the judge and counsel privately on the record. *See R.* 1:2-2. In that way the risk of prejudice is minimized.

Our careful study of the record satisfies us that the "overall conduct of the *voir dire* in this case was sufficiently probing to assure that defendant[s] received a fair trial by an impartial jury." *State v. Moore, supra,* 122 *N.J.* at 446, 585 *A.*2d 864. We are also satisfied that counsel's participation in the *voir dire* was sufficient and did not represent any abuse of discretion by the trial judge. *State v. Manley, supra,* 54 *N.J.* at 281-283, 255 *A.*2d 193. We therefore find no mistaken exercise of discretion in not conducting a sequestered *voir dire* or in limiting counsel's participation in the *voir dire.* The jury was asked all pertinent questions suggested by counsel and the trial judge was satisfied that the jurors who deliberated were fair and impartial. *See State v. Singletary,* 80 *N.J.* 55, 62-63, 402 *A.*2d 203 (1979).

B.

Defendants further contend that the sequential method employed in the exercise of peremptory

challenges was unfair and prejudicial. Before the challenging began, the judge informed counsel the procedure would be as follows:

> THE COURT: We will do it in sliding rotation. I will invite Mr. Millard [Prosecutor] to go first, and I will proceed in all cases in sequence. The sequence of the matter will be the State, Marzeno, Alongi, [and] Kamienski. The first round I'll start with him [Prosecutor]; second round I'll start with Peduto [Marzeno]; third round I'll start with Russell [Alongi]; fourth round I'll start with you [Kamienski]; will go back to the State; and we will keep going in that sequence.
>
> That will be the sequence that I use for jury selection, that will be the sequence I use for openings, that will be the sequence I use for examination [of witnesses], and that will be the reverse of the sequence I use for closing.

The attorneys clearly understood the procedure. The judge assured all counsel that if an attorney passed on a challenge or found the jury satisfactory as constituted, that attorney had not waived his right to exercise a peremptory challenge in succeeding rounds, provided he had unused challenges remaining and the jury had not been found satisfactory by all counsel. No objection to the announced procedure was raised by either attorney.

Whenever a prospective juror seated in the box was excused through a peremptory challenge, the judge did not fill that seat until that round of four

challenges (one by each attorney) had been completed. Defendants contend that by forcing them to challenge with less than fourteen prospective jurors in the box, they could not make a proper evaluation of which juror to challenge. We agree with defendants that each time a prospective juror was excused for cause or through the exercise of a peremptory challenge, that prospective juror should have been replaced before any attorney or litigant was called upon to exercise a peremptory challenge. In so doing, potential problems, which did not develop in this case, can be avoided. Our careful study of the record persuades us to conclude that the procedure employed caused no prejudice to defendants.

Based on the charges of murder and felony murder and the fact that defendants were tried jointly, *R.* 1:8-3(d) allocated 18 challenges to the State and 10 to each defendant. *See also N.J.S.A.* 2A:78-7c. The jury was found to be satisfactory to all counsel at the end of 28 rounds of challenging. At that time, only Marzeno had exhausted his full compliment of peremptory challenges; Alongi had one and Kamienski had three remaining. Six of nine challenges exercised by Alongi occurred with one vacant seat in the jury box. His last three challenges were exercised during the last 11 rounds when all 14 seats were filled. Kamienski exercised all of his challenges with all the seats filled.

State v. Brunson, 101 *N.J.* 132, 145, 501 *A.*2d 145 (1985), recommends that "the customary, one-for-one, alternating method" be followed while the Criminal

Practice Committee studies the problem. No rule has been adopted.[2] *Brunson* did not define the meaning of "the customary, one-for-one, alternating method." We believe the Court had the so-called alternating system in mind wherein the State challenges first followed by each defendant in each round. *See State v. Brunson, supra,* 101 *N.J.* at 143, n. 5, 501 *A.*2d 145.

In reality, a one-for-one alternating method was followed in this case. Sequential rotation was followed which permitted each defendant to pass after a challenge by the State or co-defendant. In that way it amounted to one defense challenge to one challenge by the State while the other defendants were free to pass. Indeed, there were only four rounds (Rounds 3, 9, 16 and 17) in which two defendants exercised a challenge in the same round. It was one-for-one in the other 24 rounds of challenging. Our

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[2] The Criminal Practice Committee's latest recommendation to the Supreme Court is that no fixed order for the exercise of peremptory challenges be established in multi-defendant cases, but that the trial judge advise the parties, prior to the exercise of the first challenge, as to the rotation for challenges to be exercised. By this recommendation, the Committee endorsed the concept that the order of peremptories should be fixed as appropriate in the unique circumstances of the case, based upon the number of defendants and number of challenges, after consideration of the position of the parties. While the Supreme Court has not ruled upon the 1992 report of the Criminal Practice Committee, we note that in this case the encouraged policy was promoted by the procedure followed with respect to the exercise of the order of peremptories. 130 *N.J.L.J.* 558, 559, 1 *NJL* 193 (1992).

review of the record satisfies us there was no prejudice to defendants and no abuse of discretion in failing to replace a challenged prospective juror in a round before requiring a defendant to challenge or pass. *See United States v. Blouin,* 666 *F.*2d 796 (2d Cir.1981).

Furthermore, the failure of counsel for Alongi and Kamienski to exercise more of their peremptory challenges during the 28th round when 14 prospective jurors were seated in the jury box, is clearly indicative that counsel did not truly feel the procedure was prejudicial or that the jury was not impartial. *See State v. Bey,* 112 *N.J.* 123, 154-155, 548 *A.*2d 887 (1988); *State v. Belton,* 60 *N.J.* 103, 107-108, 286 *A.*2d 78 (1972); *compare State v. Deatore,* 70 *N.J.* 100, 105, 358 *A.*2d 163 (1976); *State v. Pereira,* 202 *N.J.Super.* 434, 438, 495 *A.*2d 431 (App.Div.1985).

In addition, the trial judge expressed his confidence in the fairness of the jury during its deliberative process. The judge observed that in his opinion the jury picked its way through the facts, "followed the court's instructions, differentiated between conspiracy and accomplice status and found [Alongi and Kamienski] not guilty of the conspiracy [to rob and to murder] and guilty as accomplices." Even though we do not approve of the jury selection procedure employed in this case respecting the failure to immediately replace each excused and prospective juror, we share the trial judge's view that the trial jury was fair and impartial. Hence, any error

associated with the selection of the jury was harmless beyond a reasonable doubt. *R.* 2:10-2.

V. MERGER OF CONSPIRACIES

Defendants Alongi and Kamienski contend that the conspiracies under Counts Six and Seven should merge for sentencing purposes because they comprise a single conspiracy. *See N.J.S.A.* 2C:5-2. When denying the motion to merge the conspiracies, the judge stated that he was satisfied from the evidence and the verdict of the jury that the two conspiracies were separate in time, fact and scope. He stated the first conspiracy, alleged in Count Seven, was that defendants conspired with each other, Henry and Barbara DeTournay and Sidney Jeffrey, II, "to bring the cocaine into New Jersey and for the defendants to acquire it with intention or purpose of distributing it." The judge reasoned that the scope of the first conspiracy was to acquire possession of the cocaine in New Jersey. The judge stated that the second conspiracy, under Count Six, involved only the defendants which began on September 19 after the victims had been killed. The scope of that conspiracy was to share in the cocaine without being caught. The DeTournays and Jeffrey were not part of the second conspiracy.

State v. Truglia, 97 *N.J.* 513, 521, 480 *A.*2d 912 (1984) instructs that in a merger analysis, we have become more comfortable in recent years with the flexible approach formulated in *State v. Davis*, 68

N.J. 69, 342 *A.*2d 841 (1975) rather than a mechanical one. *See also State v. Dillihay,* 127 *N.J.* 42, 601 *A.*2d 1149 (1992); *State v. Cole,* 120 *N.J.* 321, 325-330, 576 *A.*2d 864 (1990). The *Davis* flexible approach entails an analysis of the evidence in terms of such factors as: (1) the time and place of each conspiracy; (2) whether the proof submitted under Count Seven was a necessary ingredient for a conviction under Count Six; (3) defendants' intent or purpose at the time of the two alleged conspiracies; and (4) whether the conspiracy alleged in Count Six was an integral part of a larger scheme under Count Seven. *State v. Davis, supra,* 68 *N.J.* at 81, 342 *A.*2d 841.

Although a close issue is presented, based on the evidence we disagree with the verdict of the jury and the decision of the trial judge as a matter of law that two separate distinct conspiracies were involved. Under the *Davis* flexible approach, the single purpose of the conspiracy was to obtain the cocaine for distribution. The role played by defendants, Jeffrey and the DeTournays was to get the cocaine into New Jersey so that it could be distributed. The ultimate conspiratorial goal of everyone was to get the cocaine from Florida to the defendants for profitable distribution. The success of that ultimate objective depended upon each member of the conspiracy carrying out his or her assigned role.

Both conspiracies charged the same time interval and objective. The evidence revealed that the drug deal was negotiated on or about September 9, that Jeffrey arrived in Toms River from Florida with the

cocaine on September 17, that defendants took possession of the cocaine on September 19 and that some of the cocaine was distributed by the first week in October 1983 or sooner. Count Six alleged conspiratorial acts occurred in Florida and in Ocean County with respect to Jeffrey and the DeTournays. Because Jeffrey and the DeTournays were the only Florida connection, the two counts must be read as charging a continuing conspiracy.

Therefore, under the *Davis* flexible approach and the totality of the circumstances approved in *State v. New Jersey Trade Waste Ass'n,* 96 *N.J.* 8, 24-27, 472 *A.*2d 1050 (1984), we conclude that the conspiracy to possess cocaine with intent to distribute under Count Six merges with the conviction under Count Seven as to Alongi and Kamienski. There was only a single conspiracy respecting the drugs that cannot be broken into two separate conspiracies. *See State v. Ferrante,* 111 *N.J.Super.* 299, 303, 268 *A.*2d 301 (App.Div.1970); Cannel, *New Jersey Criminal Code Annotated* at 208-209 (1991 ed.).

VI. OTHER ISSUES

We have considered the remaining issues raised in the respective briefs and find they are clearly without merit. *R.* 2:11-3(e)(2). We add, however, that we have examined the color photographs of the victims presented into evidence by the State. They were neither gruesome nor prejudicial to defendants. *State v. Marshall, supra,* 123 *N.J.* at 98-99, 586 *A.*2d

85. Their admission did not represent any abuse of discretion. *State v. Thompson,* 59 *N.J.* 396, 420, 283 *A.*2d 513 (1971). We have also examined the record with care respecting the prosecutor's conduct and find that he did not exceed the parameters of "permissibly forceful advocacy" established by decisional law. *State v. Marshall, supra,* 123 *N.J.* at 160-161, 586 *A.*2d 85; *State v. Ramseur, supra,* 106 *N.J.* at 322, 524 *A.*2d 188; *State v. Mayberry, supra,* 52 *N.J.* at 437, 245 *A.*2d 481.

Finally, the trial judge did not abuse his discretion in denying Kamienski's motion for a severance. *State v. Brown,* 118 *N.J.* 595, 603, 573 *A.*2d 886 (1990). Based on the allegations in the indictment, a joint trial was clearly appropriate. *State v. Moore,* 113 *N.J.* 239, 273, 550 *A.*2d 117 (1988).

VII. SUMMARY

Under the State's appeal (A-3689-88T5), we reverse the judgments of acquittal notwithstanding the verdicts of the jury. We reinstate the jury verdicts on Counts One, Two and Five. The conviction under Count Five becomes mere surplusage in this case.

Under Alongi's appeal (A-3611-88T5), we affirm the verdicts of the jury on all counts. We remand for sentencing on Counts One and Two after merging Count Five with those counts. The sentence imposed on Count Six is vacated and that count is merged with Count Seven. The judge is free to reconsider the sentence imposed on Count Seven.

Under Kamienski's appeal (A-2350-88T5), we affirm the verdict of the jury on all counts. We remand for sentencing on Counts One and Two after merging Count Five with those two counts. The sentence imposed on Count Six is vacated and that Count is merged with Count Seven. The judge is free to reconsider the sentence imposed on Count Seven.

The appeal filed by Marzeno (A-3946-99T5) has heretofore been dismissed.

The matter is remanded to the Law Division for sentencing on Counts One and Two and for the entry of amended judgments of conviction in accordance with this opinion. We do not retain jurisdiction.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

06-4536

PAUL KAMIENSKI,

Appellant

v.

ROY L. HENDRICKS, Administrator;
ATTORNEY GENERAL OF THE
STATE OF NEW JERSEY;
OCEAN COUNTY PROSECUTOR'S OFFICE

PRESENT: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDMAN, VAN ANTWERPEN,* *Circuit Judges*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

(Filed Jul. 2, 2009)

The petition for rehearing filed by Appellee having been submitted to the judges who participated

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* Judge Van Antwerpen's vote is limited to panel rehearing only.

in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Theodore A. McKee
Circuit Judge

DATED: July 2, 2009
tmk/cc: Timothyy J. McInnis, Esq.
Samuel J. Marzarella, Esq.

28 U.S.C.A. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

> **(A)** the applicant has exhausted the remedies available in the courts of the State; or
>
> **(B)(i)** there is an absence of available State corrective process; or
>
> **(ii)** circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

POINT II
CASES DEMONSTRATING CONFLICT AMONG CIRCUITS AS TO STANDARD OF REVIEW UNDER 28 U.S.C. § 2254(d)(1)

A. First, Fourth, Fifth & Eighth Circuits

Kater v. Maloney, 459 F.3d 56, 67-68 (1st Cir. 2006)

Williams v. Ozmint, 494 F.3d 478, 489 (4th Cir. 2007)

Martinez v. Johnson, 255 F.3d 229, 243-244 (5th Cir. 2001)

Skillicorn v. Luebbers, 475 F.3d 965, 977-978 (8th Cir. 2007)

B. Second, Third & Seventh Circuits

Policano v. Herbert, 507 F.3d 111, 116 (2nd Cir. 2007)

Robertson v. Klem, ___ F.3d ___, 2009 WL 2634609 (3rd Cir. 2009)

Johnson v. Bett, 349 F.3d 1030, 1034 (7th Cir. 2003)

C. Sixth & Ninth Circuits

Tinsley v. Million, 399 F.3d 796, 815 (6th Cir. 2005)

Brown v. Palmer, 441 F.3d 347, 350-351 (6th Cir. 2006)

Goldyn v. Hayes, 444 F.3d 1062, 1065 (9th Cir. 2006)

Garcia v. Carey, 395 F.3d 1099, 1102-1106 (9th Cir. 2005)

D. Tenth Circuit

Torres v. Mullin, 317 F.3d 1145, 1151-1156 (10th Cir. 2003)

Webber v. Scott, 390 F.3d 1169, 1178-1179 (10th Cir. 2004)

E. First, Sixth, Eighth, Ninth & Tenth Circuits

Hurtado v. Tucker, 245 F.3d 7, 18 (1st Cir. 2001)

Saxton v. Sheets, 547 F.3d 597, 601-607 (6th Cir. 2008)

Sera v. Norris, 400 F.3d 538, 543-548 (8th Cir. 2005)

Bruce v. Terhune, 376 F.3d 950, 957-958 (9th Cir. 2004)

Boltz v. Mullin, 415 F.3d 1215, 1230 (10th Cir. 2005)

SUPERIOR COURT OF NEW JERSEY
OCEAN COUNTY – CRIMINAL DIVISION
INDICTMENT NO. 692-10-87
APPEAL NO. not available

STATE OF NEW JERSEY,	)
Complainant,	)
	)
-v-	)
	)
JOSEPH MARZENO, a/k/a	)
ANTHONY TESTA,	)
ANTHONY ALONGI &	)
PAUL KAMIENSKI,	)
Defendants.	)

BEFORE:

HON. STEVEN P. PERSKIE, J.S.C. and a jury.
Ocean County Courthouse
Toms River, NJ

November 4, 1998

APPEARANCES:

E. DAVID MILLARD, ESQ.
Assistant Prosecutor,
For the State.

ROONEY, PEDUTO & ROONEY, ESQS.,
BY: JOHN M. PEDUTO, ESQ.,
For the Defendant, Marzeno.

JOHN P. RUSSELL, ESQ.,
For the Defendant, Alongi.

SHALJIAN, CAMMARATA,
O'CONNOR & MESSANO, ESQS.,
BY THOMAS J. CAMMARATA, ESQ.,
For the Defendant, Kamienski.

Ordered for appeal by: Thomas J. Cammarata, Esq.
and Samuel J. Marzarella, Esq.

DAYETTE J. ZAMPOLIN, C.S.R.
Official Court Reporter
Ocean County Courthouse
Toms River, NJ

[SA 2629]

* * *

[66] [SA 2694] A Probably – the date? The time?

Q Well, to the best of your recollection.

A First week of October, middle of the week at Harrah's.

Q Harrah's –

A I went – I went to Harrah's –

Q The casino?

A Harrah's Casino located in the greater Atlantic City area at the bay.

Q Okay. Tell me what happened.

A I went there, and we were in the Bay Cabaret, which is a theater. We had a drink, a cocktail or two. I had my girlfriend then up from Florida, Miss Brenda David. We were invited up to

their room with Jackie and Tony. And my lady friend and myself went to their room at Harrah's.

Q Tony Alongi?

A Tony Alongi. Yes.

Q Okay, what happened?

A We got up to the room, and Jackie had a big coat loaded with bags of cocaine, which she threw out onto the bed, ounces, broken up into ounces.

Q Ounce bags?

A Ounce bags.

Q How many?

* * *

[349] [SA 2977] is, if you listen to the way she's saying this, I don't think it's – she's not relating a conversation now. She's saying Mr. Marzeno had told. What does that mean?

THE COURT: All right. I think it should be clarified, Mr. Millard, as to exactly what she heard who say to whom.

MR. MILLARD: Okay.

MR. PEDUTO: Yeah.

THE WITNESS: Oh.

Q What did then – you indicated what Mr. Alongi said. What did Mr. Marzeno then say?

MR. PEDUTO: If anything.

Q If anything. What did Mr. Marzeno say?

A Okay. Mr. Marzeno told him that he wouldn't be getting all of his share, because he hadn't done the job properly. He hadn't weighed the bodies down. They would have never come up if he had.

Q Were you at the table the entire time?

A No.

Q I mean –

A I was going back and forth waiting on them. And one other point, I did go back up to the table.

Q Okay. And did you have a conversation with Mr. Marzeno again?

* * *

[353] [SA 2981] her thumbs extended, approximately eight inches apart.

A They were wrapped – there were two of them wrapped in plastic, thick plastic, and there was one bag that was already opened that had maybe half the amount of the two rocks, big rocks.

Q Okay. What were these in? What were these three packages in?

A Nylon green flight bag.

Q Where did you see this green nylon flight bag?

A The first time I saw it was on top of Mr. Marzeno's dryer in the condominium.

Q Where – you know where Mr. Marzeno lived during this period of time?

A Yes. In Island Heights.

Q Condominium?

A Right.

Q Is that the only time you ever saw this green nylon flight bag?

A No. I had seen it on a number of occasions.

Q What did he do with it? Did it just sit there? I mean, did he do anything with the cocaine?

A Yes.

Q What'd he do with it?

* * *

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION – OCEAN COUNTY
INDICTMENT NO. 692-10-87

STATE OF NEW JERSEY, Complainant, vs. JOSEPH MARZENO, a/k/a MICHAEL TESTA, ANTHONY ALONGI & PAUL KAMIENSKI, Defendants.	TRANSCRIPT OF PROCEEDINGS TRIAL

OCEAN COUNTY COURTHOUSE
TOMS RIVER, NEW JERSEY
NOVEMBER 9th, 1988

BEFORE:

HONORABLE STEVEN P. PERSKIE, J.S.C.
– and Jury –

APPEARANCES:

E. DAVID MILLARD, ESQUIRE
Assistant County Prosecutor,
For the State.

JOHN P. PEDUTO, ESQUIRE
Attorney for Defendant Marzeno

JOHN P. RUSSELL, ESQUIRE,
Attorney for Defendant Alongi.

THOMAS J. CAMMARATA, ESQUIRE,
Attorney for Defendant Kamienski

REPORTED BY:
GLORIA McCORMACK, C.S.R.
OFFICIAL COURT REPORTER

[SA 2988]

* * *

[31] [SA 3028] testimony in any way.

And again, I'm keeping a list of these and, again, at the end of the case will remind you of all of the in limine rules of evidence. If you don't hear from me to the contrary, everything may be considered in connection with all of the charges.

All right, Mr. Millard.

MR. MILLARD: Thank you.

Q Jean, directing your attention to another one of these trips that you had riding down to Atlantic City, do you recall a conversation with Mr. Marzeno?

A Yes, I do.

Q What was that conversation?

MR. PEDUTO: Judge, could we possibly get a time?

Q What time, approximately? Can you indicate?

A I can't be exact on a time, but it would have to be late November, early December of 1983.

Q Okay. Tell me about this conversation with Mr. Marzeno.

A Well, before we were making one of our trips to Atlantic City and before we left, we had been doing some cocaine. In fact, on the way down there we had been doing it.

[32] [SA 3029] Q Who was driving?

A I was driving. And Mr. Marzeno would talk – would start talking a lot when he did cocaine.

Q What did he say on this particular occasion?

A He had told me that, as we were driving – as I was driving, he had told me that he was going to tell me about the biggest drug deal that he ever made, and he had told me that it involved a long-haired, red-bearded hippie, and he actually didn't think the drug deal would go down because he didn't like – the gentleman that he was describing did not look like he could be trusted. But they had a first meeting, he had told me, and there was no drugs at the meeting and he didn't intend to pay him, anyway.

At the second meeting, the gentleman did have the drugs with him, and Mr. Marzeno had told me that he had to teach him a lesson. He choked him, brought him to his knees and shot him, and then after he told me that, he told me that if I ever told anybody this, that myself and my daughter would be killed, if not by him, by someone he knew or family of his.

MR. CAMMARATA: Judge –

THE COURT: Whoa, whoa.

MR. CAMMARATA: I ask for an instruction.

THE COURT: Yes, That testimony, again, or

* * *

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CRIMINAL
MONMOUTH COUNTY
INDICTMENT No. 692-10-87
APPELLATE No. A-

THE STATE OF NEW JERSEY, Complainant, vs. JOSEPH MARZENO, a/k/a ANTHONY TESTA; ANTHONY ALONGI, and PAUL KAMIENSKI, Defendants.	Transcript of Proceedings TRIAL

Ocean County Courthouse
Toms River, New Jersey
November 14, 1988

BEFORE:

HONORABLE STEVEN P. PERSKIE, J.S.C.,

. . . and a jury.

TRANSCRIPT ORDERED BY:

THOMAS J. CAMARATA, ESQUIRE,
– and –
SAMUEL J. MARZARELLA, ESQUIRE

(Appearances, Page 2)

ROSEMARY FRATANTONIO, C.S.R.
Official Court Reporter
Ocean County Courthouse
Toms River, New Jersey 08753

[SA 3478]

* * *

[180] [SA 3657] Q In this first discussion, first time you met Nick in the summer of 1983, did you have any discussions with regard to drugs?

A No.

Q Had you prior to that time ever purchased drugs from Nick DeTournay?

A Yes.

Q And when would that have been?

A Would have been possibly in the late fall of '82 or on a visit down in Florida.

Q And what kind of drugs would that have been?

A It would have been cocaine.

Q And was that – did you purchase it for use or for resale?

A No, it was for a use and sharing together with friends.

Q Did you share it with Donna Duckworth?

A Yes.

Q When we talk about a purchase like this, how much are we talking about; talking about ounces, grams or what?

A No, you're talking about half a gram, a gram, approximately.

Q And can you tell me how much a half a gram would have cost back in 1982?

* * *

[182] [SA 3659] Q Do you remember the dog's name?

A Well, they had had a dog that was similar to this dog which had been run over by a car and they had found another dog, which was a puppy, was a pup similar to the type of dog that they had. I think it was the same name, I think it was Missy.

Q When you say Nick and Barbara, this was actually the first time you saw Barbara in the summer of 1983?

A Together, yes.

Q And describe to the ladies and gentlemen of the jury what the circumstances were, what happened.

A We were in the process of preparing to take a boat ride. We were undoing the cords and lines on the boat. We were preparing to take a ride to search for Mr. Alongi's house which we tried to go there by boat, and Nick and Barbara had come walking up to the

dock, I saw them coming up the dock. They asked where we were going and I told them we were looking for a friend's house.

Q Did they get on the boat?

A Yes, they did.

Q Who else was on the boat – was Donna Duckworth on the boat?

A Yes, she was.

* * *

[186] [SA 3663] Q Did – was Mr. Lehman – did Mr. Lehman use drugs?

A Yes, he did.

Q Did Mr. Lehman ever sell you drugs?

A Yes, he did.

Q What kind of drugs?

A Cocaine.

Q How about in 1983, did he sell you any cocaine in 1983?

A Yes.

Q And, once again, how much are we talking about, ounces, grams or what?

A No, small amounts, it was never any large amounts. Half a gram, gram.

Q Was this – what did you use the drug for? Was it for your personal use or did you sell it?

A No, personal use, recreation.

Q After you met Tony Alongi through Mr. Lehman, did Mr. Alongi make efforts to sell you a condominium?

A Yes.

Q And did you strike up a friendship with Tony Alongi?

A Yes, I did.

Q Now, did – getting back to this trip that

* * *

[191] [SA 3668] Q Did you flaunt your drug use?

A No, nothing that you'd naturally be proud of but something that you did.

Q How long did you say you stayed at Mr. Alongi's house that day?

A An hour to two hours.

Q Did you – in that hour or two hours, did you ever hear any conversation between anybody at Alongi's house concerning the sale of cocaine?

A No.

Q Did you, Paul Kamienski, engage in any kind of conversation on this particular day with anybody at Mr. Alongi's house, be it Mr. Alongi, be it Nick and

Barbara DeTournay, or anybody else concerning the sale of cocaine?

A No.

Q Did you go over there that day and take that ride for the purpose of engaging in the sale of cocaine?

A No, absolutely not.

Q Did you take Nick and Barbara DeTournay to Mr. Alongi's house because you wanted to introduce them for the purposes of sale of cocaine?

A No.

Q Did you hear at any time while you were over Alongi's house, did you hear any conversation between

* * *

[194] [SA 3671] MR. CAMMARATA: This is S-3. Maybe I can hold it like this if Your Honor doesn't mind.

Q I show you S-3 for identification. Take a look at that. Do you recognize what that is?

A Yes, it's a –

Q Go ahead, what is it?

A Aerial photograph of the area north of the Seaside Heights bridge of Barnegat Bay.

Q And there's a red push pin, do you recognize what that is, where the red push pin is?

A Yes, looks like K-Dock where my boat would have been docked at Ocean Beach Marina.

Q Are you familiar with the depths of the water, for example, in the area where this yellow push pin is?

A Yes, I am very much so.

Q How are you familiar with it?

A From running aground over a period of years in the area, that's how you determine where the depths and shallow spots were in the bay.

Q The yellow pin is the recovery site of Barbara DeTournay, are you familiar with that island that's there?

A Yes, I am.

Q Back in 1983 tell the ladies and gentlemen [195] [SA 3672] of the jury, if you know, what the depth of that water in that area approximately was?

A Well, it varied but two, three feet surrounding the area. It's relatively a shallow area and the channels going to and from that vicinity are marked and very specific. Actually, you can't really stray out of the channels, otherwise you're going to run aground.

Q Would you be able to take your 38-foot boat and travel in the area where that yellow push pin is?

A No, you couldn't.

Q Why not?

A The water is too shallow; you'd run aground.

Q How about where the green push pin is, the recovery site of the body of Nick DeTournay, are you familiar with that area?

A Yes, I am.

Q And what's the depth of the water in that area?

A Well, there are some deep areas in that section, but the area where that is is notorious for shoaling and it would be also very shallow.

Q What does shoaling mean?

A Sandbars, mud banks, things like that.

Q Would you be able to take your 34 Foreplay III boat in the area where Nick DeTournay was recovered?

[196] [SA 3673] A No.

Q Why not?

A It was too shallow.

Q As you look at this photograph there are different shadings, do you know what they mean?

A Well, the shading would be generally the depth of the water, you would have sandy areas, muddy areas and thin areas that were basically dredged out or discovered to be the deeper areas

which would be your channels and that's where you would navigate your boats, smaller boats, you wouldn't have that much of a problem but anything large you have to follow the channel.

Q Okay. Did you ever take your boat out in the ocean?

A Yes, I have many times.

Q And did you ever take your boat from New Jersey and travel down to Florida?

A Yes, I did.

Q Did you see Nick and Barbara DeTournay again after this boat trip that you took on Labor Day weekend?

A No, I did not.

Q Didn't see them ever again?

A No.

Q Sure of that?

A Yes.

* * *

[202] [SA 3679] Q For what reason?

A See what was going on, what the story was, what that was all about.

Q And were you successful in reaching him?

A No, I wasn't.

Q Did you ultimately return to the shore to the Ocean Beach Marina?

A Yes.

Q Now were in the week of September after Labor Day, tell us again when did you return to the Ocean Beach Marina?

A After the funeral?

Q Yes.

A That would have been the evening of the 9th.

Q You have any recollection of seeing Nick or Barbara that weekend?

A No.

Q Now, directing your attention to the following weekend, which would be the weekend of September 16, 17, 18; correct?

A Correct.

Q Okay. Directing your attention specifically to Sunday, September 18, did you have occasion on Sunday, September 18th, to go to the Holiday Inn in Toms River?

A No.

[203] [SA 3680] Q You're familiar with the Holiday Inn in Toms River?

A Yes, I am.

Q Did you, Mr. Kamienski, meet Buddy Lehman, Mr. Alongi, Mr. Marzeno, Nick and Barbara DeTournay on the afternoon of the 18th of September at the Holiday Inn?

A No, I did not.

Q Did you have any discussions that weekend with – by phone or in any way, shape or form with Mr. Alongi, Nick and Barbara or anybody else about a cocaine deal involving three kilos of cocaine?

A Absolutely not.

Q Did you meet Nick and Barbara DeTournay the morning of September 18th?

A No, I did not.

Q What kind of car did you own back in September 18th?

A No, I didn't.

Q What kind of car did you own back in September, 1983?

A I had a 1979 AVanti.

Q You have any other cars?

A Yeah, I had a 1976 Lincoln Continental Mark IV.

Q Anything else?

* * *

[207] [SA 3684] Q All right. And who drove when you went out, for example, in your Avanti in 1983?

A Anyone but me, but primarily Donna.

Q Did you ever drive that Avanti in September of 1983 at any time?

A No, I did not.

Q How about the summer of 1983, were you ever driving this Avanti in the shore area in Dover Township?

A No.

Q Now, directing your attention, to September 19, 1983, which would be a Monday, did you, on September 19th, get in that Avanti, drive it from the Ocean Beach Marina and drop off Donna Duckworth at Janet O'Donnell's house?

A No.

MR. MILLARD: I'm going to object to the leading nature of the questions, all leading questions.

THE COURT: The question is leading.

MR. CAMMARATA: It's the meat evidence in the case. I don't see –

THE COURT: I agree with you and I think the focus is appropriate, but I think you can get at it with non-leading questions.

Q Did you drive the Avanti on September 19, 1983? Let me do it that way.

[208] [SA 3685] A No, I did not.

Q Did you at any point leave the boat with Donna Duckworth on September 19, 1983, to the best of your recollection?

A Not that I recall specifically.

Q Did you at any time – do you know – withdraw that.

Do you know Janet O'Donnell, the girl who testified here today?

A Yes, I do.

Q How long have you known Janet?

A Since approximately 1981.

Q Did you know her husband, also?

A Yes.

Q What's his name?

A Jim O'Donnell.

Q All right. And were you friendly with Janet and Jim O'Donnell back in 1983?

A Yes.

Q Did you socialize with them?

A Yes, very much so.

Q Did you go and see Janet O'Donnell on September 19, 1983?

A No.

Q Did you drop Donna Duckworth there and leave [209] [SA 3686] her on September 19, 1983?

A Absolutely not.

Q Did you ever – forgetting about September 18, 1983, was there ever a time when you drove your Avanti to Janet O'Donnell's house with Donna Duckworth with you driving, first of all?

A At no time.

Q Did you ever drive that Avanti and drop Donna Duckworth at Janet O'Donnell's house and leave ever?

A No, there was never such a time.

Q What was Janet O'Donnell's relationship with Donna Duckworth as a result of you being friends, did you have a chance to observe their relationship?

A Yes, I did.

Q How would you describe it?

A It appeared to be very close friends.

Q You've heard testimony that you were in Janet O'Donnell's wedding party?

A Yes.

Q How about Donna? She was also?

A Yes.

Q Were you at Mr. Alongi's house on September 19, 1983?

[210] [SA 3687] A No, I was not.

Q Did you, Paul Kamienski, ever go to Mr. Alongi's house, this gentleman, and see bodies on a boat in the back of his house on September 19, 1983?

A No, absolutely not.

Q Did you, Mr. Kamienski, have anything to do whatsoever, in any way, shape or form with the murder of Barbara DeTournay and Nick DeTournay?

A No, I did not.

Q Did you ever, sir, witness, first of all, did you ever witness Barbara DeTournay and Nick DeTournay being shot?

A No, I did not.

Q Did you ever help anybody dispose of the body of Barbara DeTournay and Nick DeTournay?

A No.

Q Did you ever take blankets, wrap them in blankets, tie cord, put them in a boat, do anything whatsoever with the bodies of Nick or Barbara DeTournay?

A No, absolutely not.

Q Did you have – showing you now, I think it's S-11A and B, if I'm not mistaken –

THE COURT: Are those the ones that were found –

[211] [SA 3688] MR. CAMMARATA: The orange blankets, Judge.

THE COURT: Yes.

Q Did these blankets come, from your boat?

A No, they didn't.

Q Now, did there come a time, Mr. Kamienski, where you and Donna Duckworth were having dinner at the Top O' The Mast?

A Well –

Q Let me withdraw that.

Did you frequent the Top O' The Mast for dinner?

A Yes, we did.

Q Going from – were now dealing from September 19th to September 24th, do you have a recollection of being at dinner at the Top O' The Mast on that Saturday?

A Yes, I do.

Q Who were you there with?

A I was there with Donna Duckworth.

Q Do you recall what time you got there?

A Not specifically. It would have been, I guess, early evening.

Q Did you sit down and have dinner?

A Yes, we did.

Q Did you see anybody you knew there?

A No.

* * *

[227] [SA 3704] A Well, they came aboard the boat and I showed them the entire boat from bow to stern, all the cabinets, closets, engine compartment, bar area, the entire boat inside. There was some comment as to the bar area being one of the investigators said, well, this is my area, that sort of a thing.

Q How many people searched the boat?

A I think it was two.

Q Mahony one of them?

A I believe it was. I believe it was Mahony and Churchill.

Q Did they, in addition to searching the boat, did they do anything else like tests, run any tests?

A No, there was – no, they just looked through everything as I showed it to them.

Q At the time that they searched this boat, was it in or out of the water?

A No, it was out of the water at that time.

Q There's been testimony about a certain teak box that you had on the boat. Did you have a teak box on the boat?

A Yes, I did.

Q And what did you use that teak box for?

A It was for storage of ropes, wax, things of that nature.

[228] [SA 3705] Q Did you store any rags in the teak box?

A No.

Q Did you have that teak box on September 19, 1983?

A September 19th?

Q Yes.

A I don't believe I did, no.

Q Why do you say that?

A Because the box was lost sometime prior to that.

Q And do you remember the circumstances – well, let me withdraw that.

Did that teak box have any special significance to you?

A Yes, it did.

Q What was that?

A It belongs to my father, it was on the last boat that he had, and it was something that he had purchased for the boat. And even though it was – it wasn't really a necessity to have anywhere, I just wanted to keep it as a memento, had a sentimental value to me.

Q Do you have a recollection as to what happened to that teak box?

A Yes, I do.

Q What happened to it?

A At one point, not certain of the exact date, it [229] [SA 3706] was a squall that had come through and the box was located as a step on the finger pier at Ocean Beach, the finger piers are about two and a half feet wide, it was fairly able to accommodate the box. There's a space of maybe two feet in between each boat and the finger pier, which is anchored to one piling, and whenever squalls would come through the finger piers would be pulled by the ropes on the boat, would rock violently. And I had returned to the boat at one time when a squall came through, I don't remember where I was, I remember coming back to the boat, I noticed that the bimini top was collapsed and the teak box was not on the finger pier.

* * *

[230] [SA 3707] Q Do you have a recollection what month that occurred that you repaired the windshield?

A September or October, I believe, of that year.

Q 1983?

A Yes.

Q All right. I show you a towel –

THE COURT: S-8? Was it in a box?

MR. CAMMARATA: Yes.

THE COURT: S-8.

Q S-8 in evidence. Did this towel come off your boat?

A No, it didn't.

Q Was this towel ever in that teak box that you just referred to?

A No, it was not.

Q Do you have a recollection as to what time this search of the boat took place on October 1st?

A Would have been in the afternoon sometime. It was daylight.

Q Did you, sir, on October 1, 1983, have dinner at the Top O' The Mast?

A No.

Q Did you, on October 1, 1983, have dinner with Joe Marzeno, Tony Alongi, Donna Duckworth, Jackie Sullivan Alongi and Jeannie Yurcisin?

[231] [SA 3708] A No, I didn't.

Q Did you ever sit down at a dinner, ever at the Top O' The Mast, with Joe Marzeno, Tony Alongi, Jackie Sullivan, where you were waited on by Jeannie Yurcisin?

A No.

Q Did you ever sit down at dinner with those people and have a discussion or not you, where you overheard a discussion between Joe Marzeno and Tony Alongi, where they discussed the killing of Barbara and Nick DeTournay and the weighting down of the bodies?

A No, absolutely not.

Q Did you know Jeannie Yurcisin?

A I knew her.

Q Did you know her well?

A Not very well.

Q How did you know her?

A Well, she had testified that he had met me through Al Sica the summer before, that's very possible, I don't know. You meet a number of people there at the dock when people socialize and they have company over there to their respective boats, but I knew her primarily as being a waitress at the Top O' The Mast. And, again, she said she met me through Al Sica, that's possible, I don't know.

[232] [SA 3709] Q Did you, sir – withdraw it.

Did you have occasion to see the pictures of the rope that was tied, allegedly tied around the body of Nick DeTournay?

A Yes, I did.

Q Did you tie the knots in that rope?

A No, I did not.

Q Is it that knot – did those pictures depict knots that you tied?

A No.

Q Did you have any particular style of tieing knots back in 1983?

A Tied half pitch or a double-square knot onto a piling.

Q Is that a knot that a normal boater in your experience would use?

A In my opinion, yes.

Q Now, in 1983 you were employed by the funeral home?

A That's correct.

Q Were you paid a salary?

A Yes, I was.

Q Did you ever, sir, in September of 1983, enter into a plan to rip off Nick and Barbara DeTournay of three kilos of cocaine?

[233] [SA 3710] A No, absolutely not.

Q Did you have any money need in 1983 in September where you needed money to buy cocaine?

A No, I didn't.

Q Now, after October of 1983 did you continue to live with Donna Duckworth?

A Yes, I did.

Q Incidentally, have you ever been to Joe Marzeno's condominium?

A No.

Q Have you ever seen his condominium?

A No, I didn't know where he lived.

Q You didn't know where he lived?

A No.

Q Did you ever purchase cocaine from Joe Marzeno?

A No.

Q Did you ever purchase ounces of cocaine from Joe Marzeno in October or November of 1983?

A No.

Q Are you sure about that?

A Yeah, I'm sure.

Q Did you ever – withdraw that.

Did there come a time in 1983 when you left the Ocean Beach Marina?

A Yes.

* * *

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – OCEAN COUNTY
INDICTMENT No. 692-10-87

STATE OF NEW JERSEY,	)	
vs.	)	
JOSEPH MARZENO, a/k/a ANTHONY TESTA; ANTHONY ALONGI, and PAUL KAMIENSKI,	)	TRANSCRIPT OF PROCEEDINGS
Defendants.	)	

OCEAN COUNTY COURTHOUSE
TOMS RIVER, NEW JERSEY
November 14, 1988

BEFORE:

HONORABLE STEVEN P. PERSKIE, J.S.C.,
– and a jury –

TRANSCRIPT ORDERED BY:

THOMAS J. CAMMARATA, ESQUIRE,
and
SAMUEL J. MARZARELLA, ESQUIRE

APPEARANCES:

DAVID E. MILLARD, ESQUIRE
ASSISTANT COUNTY PROSECUTOR
For the State;

ROONEY, PEDUTO & ROONEY, ESQUIRES
BY: JOHN M. PEDUTO, ESQUIRE
For Defendant Marzeno;

JOHN P. RUSSELL, ESQUIRE
For Defendant Alongi;

SHALJIAN, CAMMARATA, O'CONNOR & MESSANO, ESQUIRES
BY: THOMAS J. CAMMARATA, ESQUIRE
For Defendant Kamienski.

ROSEMARY FRATANTONIO, C.S.R.
OFFICIAL COURT REPORTER

[SA 3751]

* * *

[27] [SA 3777] that correct?

A The funeral home was my source of income.

Q That draw you were taking plus the fact that they paid all your credit card bills?

A Yes.

Q But as far as cash was concerned, real cash, the only cash you had was a couple hundred dollars a week; isn't that correct?

A I could have gotten as much cash as I needed when I needed it.

Q That's not the question. That's all you had?

A That's all I took, that's right.

Q And you don't buy cocaine with credit cards, do you?

A Not as far as I know.

Q You testified that you first met Nick and Barbara DeTournay a little before Labor Day in '83?

A Well, I met them in '82.

Q In '83?

A In 1983 I met Nick.

Q You met Nick alone?

A At first. The first time that he came by.

Q He stopped at your boat for about ten or fifteen minutes?

* * *

[43] [SA 3793] amount of cocaine from the victim?

MR. CAMMARATA: Objection, Judge.

MR. PEDUTO: He already answered it.

THE COURT: I didn't hear the answer.

What was the answer?

A I don't believe I did.

Q Could I have one of those charts, Judge?

THE COURT: Mr. Millard has – I believe that's S-2, is it not? No, that's S-3. That's S-3.

Q Mr. Kamienski, I'm showing you what is marked -3 in evidence, do you recall looking at that yesterday?

A Yes, I do.

Q You gave us some description about the depths –

MR. CAMMARATA: May I look?

Q – about the depths of the water at various locations.

THE COURT: Don't molest the jury.

MR. CAMMARATA: I won't

Q Do you recall that?

A Yes, I do.

Q And you testified that you couldn't get your boat over here by this green pushpin; correct?

[44] [SA 3794] A Well, there are certain areas that you can get in, certain areas that you can't. The area there is prone to shoaling in certain sections.

Q As a matter of fact, the only way to get into the lagoon by Mr. Alongi's house is to go right by the pushpin?

A No, there's a channel, you must follow the channel to get in.

Q The channel is right essentially in that immediate area?

A Within that opening, otherwise you couldn't get into the lagoon.

Q But my point is that this is, in fact, the only way to get into Mr. Alongi's house; is that correct?

A That's very apparent, yes.

Q To get out through here – I mean the channel is somewhere between here?

A Between these two points, that's right.

Q And you said that you know specifically how deep the water is where the pushpin is?

A Specifically how deep?

Q Yes.

A No, not specifically. I know there are areas that are shallow and there are very shallow areas there.

* * *

[73] [SA 3823] Q Where was your boat?

A Boat was at Toms River Boat Works.

Q What day did you haul your boat to the Toms River Boat Works?

A It was one day during the week prior to that.

Q Do you recall if it was September 20th, Mr. Kamienski?

A No, I don't. It might have been.

Q Might have been?

A Might have been.

Q Just one second.

THE COURT: All right.

Q Mr. Kamienski, I'm going to show you a report of Laurel Hester dated 10/10/83, page four of that report, second paragraph, does that refresh your recollection as to when you brought your boat into the Ocean Beach Marina?

A Yes.

Q When was it that you brought your boat into the Ocean Beach Marina?

A September 20th or 21st. It says the twentieth.

Q The twentieth?

A The twentieth.

Q You brought the boat in for repairs on September 20th?

[74] [SA 3824] A Which was a – yeah, I thought it was the twenty-first. Says here the twentieth, could be the twentieth, yes.

* * *

Supreme Court, U.S.
FILED
NOV 24 2009

No. 09-395

In The
Supreme Court of the United States

MICHELLE R. RICCI, ASSOCIATE ADMINISTRATOR, NEW JERSEY STATE PRISON; ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; OCEAN COUNTY PROSECUTOR'S OFFICE,

Petitioners,

v.

PAUL KAMIENSKI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

TIMOTHY J. MCINNIS, ESQ.
Counsel of Record
LAW OFFICE OF TIMOTHY J. MCINNIS
521 Fifth Avenue, Suite 1700
New York, New York 10175
(212) 292-4573

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Where a state trial judge, acting as the fact finder, determined there was insufficient evidence to support a jury's criminal conviction, and a state intermediate appellate court reversed that decision upon being presented by the state with a misleading recitation of the trial record, was it error for the federal court of appeals to grant habeas corpus relief under §2254(d)(1) of the AEDPA after it independently and carefully reviewed the entire trial record and concluded that: (1) the conviction was based on legally insufficient evidence according to the standard set forth in *Jackson v. Virginia*; and (2) the state intermediate appellate court's erroneous conclusion to the contrary was objectively unreasonable?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

a. Procedural History Supports Denial of Petition 1

b. State's Reliance on Misleading Factual Recitation 7

c. No Evidence of Kamienski's Involvement in the Murders 8

d. No Evidence of Kamienski's Involvement in "Luring" the Victims 23

REASONS FOR DENYING THE CERTIORARI PETITION 29

a. The Nature of the Opinion Below Militates Against Review 29

b. Petitioners Seek Mere Error Correction ... 29

c. Petitioners Urged the Court Below to Apply the Standard of Review They Now Challenge 30

d. Petitioners' Misconduct Makes this an Inappropriate Case for Granting Certiorari 31

TABLE OF CONTENTS – Continued

Page

e. The Issue Petitioners Raise Occurs Rarely and Even More Rarely In the Context of this Case 33

f. The Court Has Denied Certiorari in Similar Cases 34

g. There Is no Bona Fide Conflict Among the Circuits on the Issue Presented Here 34

h. The Instant Case Is Not Similar to *McDaniel v. Brown* 35

i. The Court of Appeals' Decision Was Correctly Decided 36

j. The Result Would Be the Same Under §§2254(d)(1) and (e)(1) 38

CONCLUSION 39

TABLE OF RESPONDENT'S APPENDIX

Opinion of Steven P. Perskie, P.J. Cr., New Jersey Superior Court, Law Division, Ocean County, December 21, 1988 ..... Resp. App. 1

Excerpts from Direct Examination of Sidney Jeffrey, III, State of New Jersey v. Marzeno, et al., Ind. No. 692-10-87, Superior Court of New Jersey, Law Division, Ocean County, 10/28/1988 ..... Resp. App. 7

TABLE OF CONTENTS – Continued

Page

Excerpts from Cross Examination of Sidney Jeffrey, III, State of New Jersey v. Marzeno, et al., Ind. No. 692-10-87, Superior Court of New Jersey, Law Division, Ocean County, 11/1/1988 ..... Resp. App. 9

Excerpts from Direct Examination of Donna Sue Duckworth, State of New Jersey v. Marzeno, et al., Ind. No. 692-10-87, Superior Court of New Jersey, Law Division, Ocean County, 11/2/1988 ..... Resp. App. 11

Excerpts from Transcript of Proceedings, State of New Jersey v. Marzeno, et al., Ind. No. 692-10-87, Superior Court of New Jersey, Law Division, Ocean County, 11/16/1988 (Closing Argument of Assistant Ocean County Prosecutor E. David Millard) ..... Resp. App. 13

Excerpt from Transcript of Motions and Sentence, State of New Jersey v. Marzeno, et al., Ind. No. 692-10-87, Superior Court of New Jersey, Law Division, Ocean County, 12/21/1988 (Oral Argument of Assistant Ocean County Prosecutor E. David Millard) ..... Resp. App. 15

Letter from U.S. Court of Appeals for the Third Circuit to Samuel J. Marzarella, Ass't Ocean County Prosecutor, dated 4/3/2009 ..... Resp. App. 18

Excerpts from Transcript of Oral Argument Kamienski v. Hendrix, No. 06-4536, U.S. Court of Appeals for the Third Circuit, dated 4/16/2009 ..... Resp. App. 21

TABLE OF CONTENTS – Continued

Page

Excerpt from Ocean County Prosecutor's Office Memorandum of Law in Opposition to Appeal by Anthony Alongi, No. 06-4419, U.S. Court of Appeals for the Third Circuit, filed 9/2/2009 ..... Resp. App. 28

TABLE OF AUTHORITIES

Page

CASES

Alongi v. Hendrix, No. 06-4419, *appeal pending* (3dCir.2009) 28

Brady v. Maryland, 373 U.S. 83 (1963) 20

Brown v. Palmer, 441 F.3d 347 (6thCir. 2006) 36

Cain v. Perez, No. 08-268 (5thCir.), *cert. denied*, 129 S.Ct. 496 (2008) 34

Chein v. Shumsky, 373 F.3d 978 (9thCir.), *cert. denied sub nom. Shumsky v. Chein*, 543 U.S. 956 (2004) 34

Giglio v. United States, 405 U.S. 150 (1972) 14

Jackson v. Virginia, 443 U.S. 307 (1979) ..... *passim*

Juan H. v. Allen, 408 F.3d 1262, *cert. denied*, 546 U.S. 1137 (2006) 34

McDaniel v. Brown, No. 08-559, *cert. pending*, 129 S.Ct. 1038 (2009) 35, 36

Piaskowski v. Bett, 256 F.3d 687 (7thCir.2001) 36

United States v. Johnston, 268 U.S. 220 (1925) 30

STATUTES AND RULES

28 U.S.C. §2254 ..... *passim*

N.J.S.A. 2C:2-6(b)(3) and (c)(1) 5

N.J.S.A. 2C:11-3(a)(1) 5

N.J.S.A. 2C:11-3(a)(3) 5

TABLE OF AUTHORITIES – Continued

Page

Supreme Court Rule 10 30

Supreme Court Rule 15.2 ..... 14, 20

Supreme Court Rule 24.3 35

3d Cir. Internal Operating Procedures, §5.1 et seq. 1

OPINIONS BELOW

The petition for certiorari omits the unpublished opinion of the Superior Court of New Jersey, Law Division, Ocean County, 12/21/1988, partially granting Respondent's post-trial motion for a judgment of acquittal. Resp.App.1.

STATEMENT OF THE CASE

a. Procedural History Supports Denial of Petition

The State of New Jersey petitions for a writ of certiorari to reverse a unanimous, non-precedential[1] opinion of the United States Court of Appeals for the Third Circuit. Petitioner's Appendix ("App.") 1. The opinion was summarily upheld following an application for panel rehearing and en banc review without dissent or even a requested response from Respondent Kamienski. App.156.

After briefing, oral argument and de novo review of the trial record, the court of appeals granted Kamienski relief under §2254(d)(1) of the AEDPA

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[1] The face of the opinion states: "**NOT PRECEDENTIAL**" [bold/uppercase in original]. Under the court of appeals' local rules, "not precedential" means at least a majority of the panel determined the opinion has value only to the trial court and parties. Internal Operating Procedures, §5.1 et seq. The rules further require the words "not precedential" appear on the face of the opinion. *Id.* The "not precedential" legend is missing on the opinion in Petitioner's Appendix. App.1.

because of insufficient evidence as to state murder convictions secured on an accomplice liability theory. In doing so, it reversed the United States District Court for the District of New Jersey's denial of Kamienski's habeas petition, and restored the case to its status 20 years earlier, when the state judge who oversaw Kamienski's jury trial set aside his murder convictions on that same ground. The trial court's ruling was reversed on direct appeal by a state intermediate appellate court.

The court of appeals decided for Kamienski after determining that the State had submitted to it a recitation of the trial record that was both "misleading" and "unhelpful," App.11, n.8 & n.9. It further opined during oral argument that the State had caused the state appellate court to reach an erroneous holding because it had filed the same misleading and unhelpful description of the trial record in the state appellate proceeding. Resp.App.22. ("And that's what caused the state to rule the way they did.").

According to the court of appeals, the State's misconduct included: drawing inferences from "selective reliance on testimony"; using the term "defendants" in a manner intended to include Kamienski, when the record showed the evidence to which the State was referring pertained only to Kamienski's codefendants; and, citing evidence that had been admitted at trial as to only Kamienski's codefendants. App.11, n.8 & n.9. The court of appeals made these observations in response to Kamienski's reply brief which outlined

106 instances in the State's opposition brief where the State made factual representations that were unsupported by, or contrary to, the trial record. In a highly unusual request, prior to oral argument the court of appeals asked the State to rebut just two such examples and gave it an opportunity to file a letter brief with supplemental exhibits to defend itself against Kamienski's charges of prosecutorial misconduct. Resp.App.18-19. The State never responded substantively to the court of appeal's two-example litmus test. At oral argument, the panel also noted the State had cited "stricken testimony" throughout its brief, and that doing so was "totally improper." Resp.App.21-22.

The court of appeals further determined that the State's submission to it was materially at odds with positions the State had taken at trial. App.12-14, 23-26, & n.15. It noted that, "Ironically, the prosecutor's closing argument to the jury and post trial representations to the court are the most accurate assessment of the evidence the government produced at trial." App.23. And, it characterized the State's stance on appeal as "a bit of a paradox," App.25, given that it was the polar opposite of its position at trial—potentially rising to the level of "judicial estoppel." App.15 n.15.

The "paradox" to which the court of appeals referred was the State's contradictory positions as to whether there was any evidence of Kamienski's antecedent knowledge of a scheme to rob and kill the two murder victims during a planned drug deal. At

the trial court, the State repeatedly conceded there was no such evidence. Resp.App.13-14 and 15-17. In contrast, on direct appeal, and in the federal habeas proceedings, the State contended there was highly attenuated circumstantial evidence from which one could infer antecedent knowledge and a shared intent to commit murder.

The court of appeals also actively responded to the State's attempt to fabricate proof of Kamienski's antecedent knowledge during oral argument. When asked to provide just one example of evidence showing Kamienski knew in advance of his codefendants' murderous intentions, the State was at first nonresponsive and ultimately apologetic. Resp.App.22-26. During that exchange, when pressed to cite any example, the State replied falsely that after a supposed meeting with the victims on the night before the murders, "*All* the parties on their way home were talking about how this was a bust," i.e., a phony drug deal that was really going to be a robbery and murder. Resp.App.23 (emphasis added). This statement was completely unsupported by the record and was revealed to be so when the court of appeals pointedly asked the State at least five times to justify its assertion that Kamienski participated in such a conversation, and the State would not, or could not, answer the court's question. Resp.App.23 (twice), 24,25,26.

Beyond the issue of the State's misconduct, the subject of the court of appeals' opinion leading to the grant of Kamienski's habeas petition under §2254(d)(1)

was a decision by the Superior Court of New Jersey, Appellate Division. App.100. That decision purported to apply the sufficiency of evidence standard in *Jackson v. Virginia*, 443 U.S. 307 (1979), to the trial record. App.131-32. The state appellate court reinstated murder convictions against Kamienski which the judge who had presided over his jury trial at the Superior Court New Jersey, Law Division—Ocean County had dismissed on grounds of insufficient evidence following post-trial motions, briefing and oral argument. Resp.App.1. To obtain relief in the state appellate court, the State submitted a brief containing virtually the same misleading recitation of the trial record the court of appeals found to be improper below.

In deciding for Kamienski, the court of appeals agreed with the trial judge's original finding that the evidence as to Kamienski's murder convictions was legally insufficient under *Jackson*. Specifically, the court of appeals determined that the evidence adduced at trial, and all inferences reasonably drawn therefrom, did not satisfy the essential elements of New Jersey's aiding and abetting statute,[2] as applied to the substantive crimes of murder[3] or felony murder.[4] Rather, the court of appeals reasoned, one had to impermissibly resort to "rank speculation" to

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[2] N.J.S.A. 2C:2-6(b)(3) and (c)(1).

[3] N.J.S.A. 2C:11-3(a)(1).

[4] N.J.S.A. 2C:11-3(a)(3).

conclude otherwise. App.22-23. Accordingly, it held that the state appellate court's determination that the evidence met the *Jackson* standard was erroneous. The court of appeals further held that this error was objectively "unreasonable," as seen through the highly deferential lens of the AEDPA, because the state appellate court had "conflated" proof of Kamienski's role in the underlying drug deal with proof of murder. App.2,19-20,25-26,30-31.

The court of appeals also rejected the State's earlier attempt to deem murder a "continuing offense" in order to improperly expand the duration of the offense to include efforts to hinder detection of a murder after it had already been completed by another person. The court of appeals found that theory legally unsupportable and noted that the State did not press it on appeal. App.23 ("[T]he state's murder theory against Kamienski had been based on some abstract notion that the crime of murder is a continuing offense that includes attempts to dispose of the victim's body. That is a theory that is as unique as it is baseless and the state has not pursued it on appeal.").

The court of appeals' application of the standard of review under *Jackson*, which the State now challenges in the instant certiorari petition, was precisely the same standard it urged the court of appeals to apply. Resp.App.26. In addition, the State agreed at oral argument that the matter should be analyzed under §2254(d)(1), and, unlike in its certiorari petition, it said nothing below about dispensing with that

provision and addressing Kamienski's appeal under §§2254(d)(2) and (e)(1). Resp.App.26-27.

Having determined that Kamienski met the twin requirements of §2254(d)(1), the court of appeals instructed the district court to grant his habeas petition and to order his immediate release from prison. The court of appeals issued its mandate over the State's objection. The district court granted the habeas petition over the State's objection. And, the district court ordered Kamienski's release on bail after more than 20 years of incarceration, also over the State's objection.

b. State's Reliance on Misleading Factual Recitation

The factual statements in Kamienski's brief in opposition are drawn primarily from the court of appeals' opinion, App.1-31, unless indicated otherwise. In contrast, the State asks the Court to refer to the district court opinion, App.32-99, and state appellate court opinion, App.100-155, for the factual background. Petition for Writ of Certiorari ("Pet.") at 3. On key issues (for example, whether Kamienski met with the victims the night before their murders and helped "lure" them to a death-trap at an isolated location the next day) there is a sharp conflict between the court of appeals' view of the evidence in the trial record and the views of the district court and state appellate court.

As shown above, the court of appeals determined that the State had submitted a misleading brief to the state appellate court and that this brief improperly affected the state court's view of the record. The same is true of the State's submission to the district court. Both decisions repeat (and in some instances lift verbatim) parts of the State's misleading factual recitation. For example, the state appellate opinion says that "The bodies were tied with a hitch knot *peculiar* to . . . Kamienski," App.137 (emphasis added), when the record is to the opposite effect, *see infra* p.15. Likewise, the district court opinion states that "Kamienski . . . arranged the September 19, 1983 meeting" at which the victims were executed, App.67, when there is no support for this in the record, *see infra* pp.23-29. The court of appeals' opinion, as well as the panel's comments during oral argument, confirms the merits of Kamienski's charge that the State submitted misleading briefs on direct appeal and in the district court and thereby tainted those courts' opinions. Thus, one cannot rely on those courts' recitation of the facts, as the State urges here.

c. No Evidence of Kamienski's Involvement in the Murders

Kamienski was tried in Ocean County, New Jersey in 1988 on drug and homicide charges. The charges stemmed from a planned cocaine deal between four people (two buyers and two sellers) that Kamienski had socialized with separately and introduced to each other two weeks before the drug deal at the sellers' request. The two buyers, Anthony

Alongi and Joseph Marsieno, were middle-aged men from New Jersey whom Kamienski had met that summer at the Jersey Shore area. The two sellers, Henry "Nick" and Barbara DeTournay, were a married couple in their 30s from Florida whom Kamienski had met about a year earlier through boating. Kamienski, age 35 at the time, had previously purchased drugs from each party for his personal use (the record established he never dealt in drugs, SA2490)[5] and had used drugs with them. Kamienski, himself, was neither a buyer nor seller in the contemplated drug transaction, nor was he a commissioned broker in the sale. The trial record said nothing about Kamienski having any financial interest in the deal, and the State has never claimed otherwise.

When the certiorari petition first identifies the "buyers" in the drug deal, it correctly says they were Kamienski's codefendants. Pet.4. ("Kamienski brokered the sale of three kilos of cocaine between sellers Henry and Barbara DeTournay from Florida and *buyers Anthony Alongi and Joseph Marsieno* from New Jersey . . . ") (emphasis added). Later in the certiorari petition the State repeatedly uses the word "buyers" broadly to include Kamienski in attempting to show sufficient evidence against him. E.g., Pet.31-32. ("The state appellate court detailed the testimony

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[5] "SA" refers to pages in the supplemental appendix Kamienski filed with the court of appeals.

demonstrating the involvement of Kamienski, Alongi and Marsieno in these murders. . . . The state court recognized *a "scheme" of the buyers* to lure the victims and their cocaine away from the public Holiday Inn to a more private place. . . . Thus, on September 18, [1983,] the first scheduled transaction at the Holiday Inn failed because Henry did not bring the drugs, so '*the buyers* informed Henry that they were having some difficulties getting the money together. At 6 p.m. that evening, Kamienski, Alongi and Marsieno met at the Holiday Inn.'") (emphasis added; record citations omitted). *See also* Pet.6,31-33.

Where the State suggests that Kamienski was one of the "buyers" of the cocaine, or that he met with the victims on September 18, 1983, or that he participated in "luring" the victims to their deaths, those assertions are not only unsupported by the record, but also completely contrary to it, as the court of appeals' opinion correctly notes. App.5 (Kamienski had no contact with the victims after he introduced them to the buyers except for a brief, inconsequential telephone call 10 days before the killings.). Additionally, by repeatedly using the term "buyers" in the certiorari petition to include Kamienski, the State is mirroring what it did below, where approximately 55 times it improperly used the word "defendants" in its briefs to erroneously include Kamienski, which is one of the specific ways that the court of appeals found the State's recitation of the trial record to be "misleading." App.11 n.9.

According to the testimony of Marsieno's then girlfriend, he confessed to her that on the day of the scheduled drugs-for-cash exchange he single-handedly shot and killed both DeTournays with a 9 mm pistol that was never recovered and stole their cocaine. Their bodies were discovered by local police a few days later in the Barnegat Bay near Toms River, New Jersey. Although there was no physical or eye witness evidence as to when and where the killings took place, the State surmised that it was in the early evening of September 19, 1983, at Alongi's Toms River residence, and prosecuted the case on that assumption.

The State tried Kamienski for murder and felony murder on conspiracy and accomplice liability theories. It claimed he was at (or near) the place where the murders occurred, and, that while he was surprised by the drug deal turning into a robbery and murder, and, in fact, did not want it to happen, he nevertheless helped conceal the bodies afterwards. This is reflected in the prosecutor's closing argument, which the court of appeals' opinion quotes extensively:

> *Am I going to say does Paul Kamienski know that they're going to get killed? I don't think so. Not from the evidence and testimony that I've heard. . . .*
>
> And you know what, Tony [Alongi] and Joe [Marsieno] . . . murdered them in cold blood. . . . And I submit to you that's what occurred at that point in time was that Paul Kamienski assisted Marzeno and Alongi in

> getting rid of the bodies. . . . *I'll say this, he never expected it to happen, he didn't expect them to be murdered. . . .*
>
> *. . . I've indicated to you that I don't think that Paul Kamienski—I don't think that [he] was a part of a conspiracy to murder those people, I think he very clearly was a part of the conspiracy, that second conspiracy to possess that cocaine with intent to distribute it.*

App.13-14 (italics and brackets in original). These statements by the prosecutor during summation are clearly at odds with the State's contention here that, "The State's theory at trial was that Kamienski's actions *before, during and after* the crimes proved his guilt as an accomplice to robbery and murder." Pet.5 (emphasis added).

Moreover, the prosecutor's statements in closing were not, as the certiorari petition claims, a brief "moment of unscripted candor" in a lengthy trial. Pet.4.[6] The prosecutor said the same thing many times at trial, Resp.App.13-14, and during his lengthy colloquy with the trial judge during post-trial motions. As an example of the latter, the court made the following observation and the prosecutor gave the following reply:

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[6] How, even if this were true, it would affect the legal significance of the prosecutor's statement is not clear. A brief moment of unscripted candor can be equally or even more telling than a long, rehearsed soliloquy.

> The Court: . . . There is *no way* that Kamienski could be responsible for the murder on the basis of anything that happened *before* they all got to the Alongi house on the afternoon of the 19th. . . .
>
> [Prosecutor] Millard: I agree.

Resp. App.15-16 (emphasis added); *see also* App.14 (court of appeals noting the prosecutor agreed with the following statement by the trial judge during post-trial motions: "prior to the afternoon of the 19th there was nothing suggesting that [Kamienski] knew of and agreed to assist in or conspired to commit a robbery or a murder . . . [a]nd the jury so found.").

No one actually saw Kamienski at Alongi's house at the time of the killings or witnessed him physically assisting in disposing of the bodies afterwards. In fact, one of Alongi's neighbors, George Hunt, who was familiar with Kamienski's Avanti sports car and 36 foot power boat with a flying bridge, SA1803-04, was regularly observing Alongi's house throughout the afternoon and evening of the murders and he never testified that he saw Kamienski or his car or boat there at any time that day.

Rather, the State's conclusion as to Kamienski's presence at Alongi's house during the murders and the role he played in disposing of the bodies came exclusively from multiple chains of inferences it tried to draw from the uncorroborated testimony of Kamienski's ex-girlfriend, Donna Sue Duckworth. She had recently pleaded guilty in Ocean County to unrelated

drug charges and was awaiting sentencing at the time of Kamienski's trial, but testified she had not received any promises from the prosecutor's office in exchange for her testimony. SA2065-66.[7] Not only did Duckworth's trial testimony relate to events occurring five years earlier, but she admitted that during the relevant timeframe she was under the influence of drugs and alcohol on a near-constant basis. SA2096-05. There was also testimony from a non-party witness who said that around the time she started to cooperate with law enforcement authorities (circa September 1987), Duckworth had split up with Kamienski on bad terms and threatened that, "I'm going to cut his fucking balls off." SA3627.

It was in the foregoing context that Duckworth testified as the State's main witness against Kamienski. Among other things, she said he told her he could not control the events leading to the deaths of the DeTournays. She said he also told her that Henry had been killed first and Barbara did not suffer. She further said Kamienski warned her that if they both did not keep their mouths shut they both would end

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[7] An issue Kamienski raised in state post-conviction proceedings and his federal habeas petition, and preserves here pursuant to Supreme Court Rule ("SCR") 15.2, was a possible violation of *Giglio v. United States*, 405 U.S. 150 (1972), since the post-trial record showed Duckworth was admitted into the state's pretrial intervention program upon the recommendation of the State (and her charges were ultimately dismissed), even though she had been rejected from that program prior to her testimony. This issue was not certified for appeal.

up like the DeTournays and he would be unable to prevent it. (The State mischaracterizes the latter as Kamienski "threatening" Duckworth. Pet.2,3, when the record shows only he cautioned her that, "if we didn't shut up that he wouldn't be able to save me or himself." SA2034.).

Additionally, Duckworth testified that a floral-pattern towel recovered with Henry DeTournay's body "looked like" a polishing rag Kamienski kept with similar rags in a box on his pier, although she could not say for sure because it lacked any unique identifying features. SA2507-08 ("It looked like a towel from [the rag box]. . . . It doesn't have our initials on it."). She also said two non-descript, earth-tone blankets found around each victim when their bodies were recovered from the Barnegat Bay "looked like" blankets Kamienski used and kept on his boat, although again she could not be certain. SA2510-11 ("I can't identify that blanket in particular as being on or off the boat. . . . No, I cannot state that in fact these two [blankets] came off the boat."). And finally, she said that a knot depicted in a crime scene photograph of a plastic-coated clothesline that was tied around Henry DeTournay's body and tethered to a cement cinderblock was the type of "hitch" knot Kamienski made when tying up his boat, although she acknowledged she had seen "other people" tie the same knot in "many circumstances." SA2514-18.

At trial, the State never explained logistically how Kamienski retrieved the blankets and towel, which were on his boat and pier at a marina in Lavallette,

New Jersey, several miles away from Alongi's house across the Barnegate Bay. Nor, did the State ever explain why Marsieno needed those items from Kamienski given that the murders purportedly took place at the Alongi residence (where Alongi had lived for two years with his then fiancée and his teenage son, SA3391-92, and which would have had towels and blankets), and also that the victims' car, which they had driven up from Florida and parked in Alongi's driveway just before the murders, was full of towels and blankets. S-27, S-49 and S-51.[8]

In the certiorari petition, the State claims for the first time that Kamienski knew about the murders in advance and, with premeditation, brought the blankets and towel with him to conceal the bodies afterwards:

> Kamienski's boat was docked several miles away from Alongi's house, yet Duckworth saw those items [the two blankets and floral towel][9] in Alongi's yard on September 19, giving rise to the inference that *Kamienski did not just happen to appear there after the murders, but had in fact participated in them by bringing supplies to dispose of the bodies. . . . Kamienski's . . . furnishing of materials provide strong proof of premeditation*

---

[8] "S-" refers to the State's physical evidence at the investigative and trial court level.

[9] Actually, Duckworth did not testify about seeing the towel at Alongi's house on the 19th.

> *on his part, sufficient to convict him as an accomplice to robbery and murder.*

Pet.35-36 (emphasis added). However, not only is the State's newly-crafted inference, appearing for the first time in the instant certiorari petition, contrary to the theory on which it prosecuted Kamienski (i.e., he did not know about the murders until events unfolded at Alongi's house), and not only is it also highly implausible under the circumstances of how and when and where the murders occurred, but it is also pure conjecture. There is no evidence in the record to support it.

Lastly, the State never explained at trial why Kamienski was linked to the blankets and towel, but not the other unusual items found with the DeTournays' bodies. Henry's body was placed in a blue sleeping bag before it was wrapped in the blanket, and tethered by the plastic-coated clothesline to the cement cinderblock. SA0627-31. The State never connected the sleeping bag, clothesline or cinderblock to Kamienski. Additionally, a colorful woman's blouse, blue jogging pants and a woman's hair brush were found inside the sleeping bag containing Henry's body. SA0630. The State never answered why these woman's articles came from some source other than Kamienski, but the floral towel found with them came from him.

Relatedly, the State never ruled out the most likely scenario: that all of the feminine objects found with Henry's body had come from the green nylon bag

in which the DeTournays had concealed the cocaine while transporting it and which Barbara brought to the drug exchange, and that Marsieno spilled these objects out and left them behind after he killed the DeTournays and made off with the cocaine in the very green bag Barbara had brought with her. Pet.7 ("At the Holiday Inn around that same time, Barbara DeTournay was in Sidney Jeffrey's room with the kilos of cocaine packed in a green nylon bag, waiting to be picked up after Henry was supposedly done counting the money."), and Pet.10 ("Later that night in Marsieno's condo, Yurcisin glimpsed three blocks of cocaine wrapped in plastic contained inside a green flight bag, with one bag opened and half empty."). All of these unexplained questions concerning the link vel non between the physical evidence at the crime scene and Kamienski bear on whether "any rational trier of fact could have found the essential elements of [accomplice liability to murder and felony murder as to him] beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

Duckworth also testified Kamienski dropped her off at her friend's house in Sea Side Heights, New Jersey, a few miles away from Alongi's house, on what the State believed was the afternoon of the murders. Duckworth said this was unusual since she and Kamienski were always together during that period of time. Both Kamienski and Duckworth's friend, Janet O'Donnell, denied at trial that this event had occurred. SA3684 and SA3574, respectively. Since the jurors acquitted Kamienski on the murder conspiracy

charge, they either disbelieved Duckworth's testimony or did not attribute to it the significance the State tries to give it now, namely, that it was evidence of a premeditated plan on Kamienski's and his codefendants' part to eliminate an eye-witness to the DeTournays' murders.

Duckworth further said that around dusk that evening Kamienski picked her up at O'Donnell's house and brought her to Alongi's home, where, in defiance of Kamienski's instruction to stay inside, she went to the back yard where she saw Kamienski standing on land seemingly speaking to Alongi who was standing in a boat moored at his dock. Duckworth said that in the boat were shapes under some blankets and a sleeping bag that could have been bodies and that the surrounding area appeared to be wet, implying it may have been hosed down. After making these observations, Duckworth said Alongi made a menacing gesture towards her, but Kamienski calmed him down by assuring him she was all right.

The foregoing was all the evidence the State adduced with respect to what Kamienski did at Alongi's house around the time of the killings or shortly thereafter. And, to repeat, it all came from the uncorroborated testimony of Duckworth, whose testimony the court of appeals accepted as true.[10]

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[10] Kamienski concedes for purposes of the instant certiorari petition the State is entitled to the presumption her testimony was truthful and accurate. However, solely to preserve possible

(Continued on following page)

According to the certiorari petition, aside from Duckworth's testimony, the only other noteworthy State witnesses against Kamienski were Marsieno's girlfriend, Jean Yurcisin, and a mutual acquaintance of Kamienski and Alongi, Arthur "Buddy" Lehman. Yurcisin testified that after the killings she saw Marsieno give Kamienski cocaine for his use and did not charge him for this. Duckworth said the same thing. Both Yurcisin and Duckworth admitted that Marsieno had also given them free cocaine after the murders. SA2977-78 and SA2045-46, respectively. The State suggests that when Marsieno gave free cocaine to the two women it was to shut them up or calm them down, but when he gave it to Kamienski it was

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arguments in other proceedings, SCR 15.2, Kamienski notes that at both the court of appeals and district court he submitted proof that: (1) the State, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), failed to turn over FBI hair and fiber lab notes showing Kamienski's hair was not found on the blankets which Duckworth said looked like ones he used and kept on his boat, and that the former supervisor of the FBI lab opined in an affidavit submitted to the district court that the arrays of hairs collected from the crime scene suggested that the blankets had come from the victims' own car; (2) defense counsel failed to use an FBI lab report showing that the towel Duckworth said looked like a rag Kamienski polished his boat with had no traces of polish on it; (3) the knot on the ligatures the State said was "peculiar" to Kamienski was, in fact, a common hitch knot that could not be linked to any one person, according to a forensic knot analyst; and (4) Duckworth's chronology of what she did on the day of the murders was contradicted by credit card records and eye-witness affidavits obtained post-trial and submitted to the district court. These issues were not certified for appeal.

to "reward" him for his "participation" in some unspecified aspect of the robbery, murders or disposal of the bodies. Pet.2,3. It is only the State's speculation as to Marsieno's motive in giving Kamienski free cocaine. There is no evidence implying it was a "reward" or if so what conduct was being rewarded. However, the jury's acquittal of Kamienski on the conspiracy to murder charge precludes a finding that it was a reward for acting in concert with Marsieno in planning and carrying out the murders.

Additionally, Yurcisin said she observed verbal disputes between Marsieno and Alongi after the murders where the latter demanded "his share" of the cocaine and Marsieno withheld some of it because Alongi (not Kamienski) had made a mistake in getting rid of the bodies. E.g., SA2976-77. (" . . . Mr. Alongi was saying he wanted his share. . . . Marzeno told him [Alongi] that he wouldn't be getting all of his share, because he [Alongi] hadn't done the job properly. He hadn't weighed the bodies down. They would have never come up if he had.") Neither Yurcisin nor Duckworth said the word "share" was used with respect to the cocaine Kamienski received from Marsieno, and neither testified that either Marsieno or Alongi said anything about Kamienski having any role in disposing of the bodies.

Yurcisin also testified about picking up Marsieno by himself at the Holiday Inn around 8 p.m. on September 18, 1983, as well as what Marsieno said to her and what she saw thereafter. SA2970-73. Yurcisin said Marsieno told her of a meeting at some

unspecified time and place with the victims and of his intent to rob and kill them. She also testified that when they were alone at his condominium later that evening Marsieno showed her the gun he intended to use. But, Yurcisin never said Marsieno told her anything about meeting with Kamienski along with the victims before she had picked him up that evening, or that Kamienski knew of Marsieno's robbery-murder plan, or even that Kamienski knew Marsieno had the gun which he had shown her.

Lehman was the other significant State witness against Kamienski, according to the certiorari petition. He testified Kamienski told him that "my friends" (plural) had been killed. Kamienski made this statement a few days after the murders at a time when the authorities had recovered only Henry DeTournay's body. They contacted Kamienski about Henry because they had found Kamienski's business card in his wallet. Thus, from Lehman's testimony one could infer only that Kamienski knew from some source other than the police that both victims had been killed days earlier. Lehman also testified that in conversations with him, Alongi referred to Marsieno as "my partner" and discussed their falling out after the DeTournays' bodies were discovered. SA2690, SA2696. Lehman never said anything similar about Kamienski being called the "partner" of either Alongi or Marsieno.

In short, even the certiorari petition concedes the homicide case against Kamienski was entirely circumstantial, Pet.22, with crucial evidentiary gaps that had to be filled in by inference or speculation. There

was no forensic or eyewitness evidence connecting Kamienski to the crime scene or the murders. And, there was no evidence as to precisely where Kamienski was and what he was doing at the time of the robbery and murders.

Further, there was no evidence Kamienski knew in advance of Marsieno's plan to rob and kill the DeTournays, that Marsieno possessed or intended to bring a firearm to the drug exchange, that Marsieno and Alongi did not have the wherewithal to pay for the cocaine, or even the approximate amount of cocaine at stake or its estimated value. The size of the deal was not set until the week after Kamienski introduced the DeTournays to Alongi and was much larger than the DeTournays had originally planned: escalating from "grams or ounces" to "pounds or kilos." SA1149-52. And, that change occurred at meeting in Toms River when Kamienski was many miles away in Garfield, New Jersey. SA2020-21.

Lastly, there was no evidence Kamienski had any motive for killing the DeTournays. They were friendly acquaintances of his and stood to be a regular source of cocaine for Kamienski, who, according to the State's witnesses, was a frequent user.

d. No Evidence of Kamienski's Involvement in "Luring" the Victims

Telephone records introduced by the State, S-7, failed to show Kamienski had any contact with the DeTournays after introducing them to Alongi two

weeks before the killings, aside from one brief telephone call with Henry 10 days before the murders, and in that call all Kamienski was overheard by Duckworth to say was, "no, [I don't] have a scale and get off the boat." SA2021. The lack of any evidence reflecting communication between Kamienski and the DeTournays for many days leading up to the drug exchange was particularly noteworthy and inconsistent with the State's theory of his role in it. While the State characterized Kamienski as a "broker" in the drug transaction, and the authorities found Kamienski's telephone and beeper numbers in Henry's wallet, there was no evidence of any telephonic or beeper communications between Kamienski and either victim other than the brief telephone call described above.

The court of appeals' opinion correctly notes that this inconsequential telephone call, which records showed took place on September 9, 1983, was the only evidence of any conversations between Kamienski and the DeTournays between the time he introduced them to Alongi at a Labor Day barbeque at Alongi's house (on September 5, 1983) and the date of the murders (on September 19, 1983). App.5.

In its certiorari petition, the State claims otherwise. It says the evidence shows Kamienski, Alongi and Marsieno, as well as Duckworth and Alongi's fiancée Jackie Sullivan, met with the DeTournays at the Toms River Holiday Inn on the evening of September 18, 1983. Pet.5-6,31-33. The State further says that at the meeting Kamienski helped "lure" the

victims to an isolated place the following day where they could be robbed and murdered without detection. *Id.* It claims that Kamienski did this by conveying (or helping to convey) a message to them that Alongi and Marsieno "were having trouble getting money together" and needed an additional day. *Id.*

The State's assertion that Kamienski met with the victims at any time on September 18, 1983 is completely unsupported by the record and is directly contrary to the all the evidence in the case, including, the testimony of Duckworth and that of the DeTournays' friend and drug courier, Sidney Jeffery, III.[11] Duckworth said she was with Kamienski all day on the 18th. The day began and ended with them alone on Kamienski's boat. SA2144-45, SA2179-80. The only time they were at any other location was for a short "happy hour" gathering at the Toms River Holiday Inn. SA2025. And, according to Duckworth, the only people she and Kamienski met with at the Holiday Inn that evening were Alongi and Sullivan, Marsieno, and briefly Lehman. SA2025-26. Moreover, she did not observe or recall anything memorable being discussed at that social gathering. SA2025. Parenthetically, in contradiction to Duckworth's testimony, fellow State witness Lehman denied he met with Kamienski and the others at Holiday Inn on the night of September 18, 1983. SA2688-89, SA2908.

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[11] The court of appeals misidentifies him as "Jeffrey Sidney." App.6.

According to courier Sidney Jeffrey, the DeTournays always contemplated in advance of it that the drug exchange would take place nearby, but not actually at, the Holiday Inn. He said Henry DeTournay gave him directions to the hotel and told him to hold the drugs there "because that was *close* to where the deal was going to take place." Resp.App.7 (emphasis added).

So the State's notion, which it articulated for the very first time in the state appellate court proceeding, having never once mentioned it during the opening or closing at trial, SA0498-19 and SA4267-48, respectively, that anyone, let alone Kamienski, had to "lure" the victims away from the hotel to an isolated location to complete the drug deal is contradicted by the unambiguous record. It is also contracted by the prosecutor's own words to the jury during closing, "We know when [Sidney Jeffrey] gets in, he gets in on the seventeenth, that's the day he checks in at the Holiday Inn, which is . . . *near to* where the deal is going down." Resp.App.13 (emphasis added).

In other words, the Holiday Inn was never the intended place for the deal. The exchange was always planned for someplace "close" or "near" to the hotel, such as Alongi's house, which was just a few minutes drive away. The Holiday Inn was located on Rt. 37 in Toms River, SA2725; Alongi's house was located on Baron Street, also in Toms River, SA3392, only a few miles away from the hotel.

Additionally, Jeffrey stated many times over that Henry DeTournay never came onto the Holiday Inn premises. Resp.App.7-9. He emphasized that Henry would not go "anywhere near" the hotel. Resp.App.10. This was because Henry (with long red hair and a long red beard) "looked like a hippie" and he did not want to focus attention on himself in a way that might cause law enforcement personnel to find the cocaine, which Jeffrey had stashed in his room at the Holiday Inn while awaiting delivery instructions from the DeTournays. Resp.App.10.

Remarkably, Jeffrey also said he was in the bar at the Holiday Inn at same time that Duckworth said she and Kamienski met the others there for happy hour. SA1578. When Jeffrey was asked who he recalled seeing there at that time, he said the only person he could recall was the bartender and no one else. Resp.App.9-10. Accepting Duckworth's testimony about the gathering as true, clearly, the DeTournays were not in the Holiday Inn bar when Jeffrey, and coincidently, Kamienski and the others were there for happy hour.

Jeffery further testified that on September 18, Henry told him of the conversation about postponing the drug exchange for one more day so the buyers could get the money together. Henry told Jeffrey about this conversation shortly after it had taken place at Alongi's house sometime between 10 a.m. and 11 a.m. on September 18, and not during happy hour later that evening. Resp.App.7-8. The record establishes that Kamienski was not at Alongi's house that

morning and the only people the DeTournays spoke to there were Alongi's fiancée, Sullivan and Alongi. SA3434-38.

The State actually agrees with the foregoing chronology in a brief it has filed in opposition to Alongi's pending appeal in the Third Circuit. In that brief the State says the record shows that:

> On September 18, 1983, when the deal was originally supposed to happen, *Nick [Henry DeTournay] went to [Alongi's] house without the cocaine, where he spoke with [Alongi]. Nick shortly thereafter saw Jeffrey and told him that "they were having trouble getting the money together" and that the deal would be postponed until September 19 at 3:00.*

Alongi v. Hendrix, No. 06-4419, United States Court of Appeals for the Third Circuit, document 00319795536, filed 09/02/2009, at p. 39 (emphasis added). Resp.App.28. In contrast, in its certiorari petition here the State claims the above-referenced conversation about getting the money together and postponing the deal until September 19 took place at the Holiday Inn in the early evening of September 18 with Kamienski present.

The State's claim in the certiorari petition that Kamienski met with the DeTournays for an aborted drug deal at the Holiday Inn on the 18th, and that during the meeting he actively "lured" them to their deaths is also contradicted by the trial prosecutor's summation, where he said:

> Donna Duckworth tells you that there's a meeting at the Holiday Inn later on that day [September 18, 1983], cocktail hour . . . she doesn't see *the DeTournays, they weren't there.*

Resp.App.13 (emphasis added).

One must presume the jury also found Kamienski did not attend any meeting with the victims the evening before the murders at which he helped lure them to their deaths 24 hours later. This is because it acquitted him of conspiracy to commit murder and to do so would be inconsistent with a factual finding that Kamienski not only knew of the killings in advance but acted in concert with his codefendants beforehand to facilitate them.

REASONS FOR DENYING THE CERTIORARI PETITION

a. The Nature of the Opinion Below Militates Against Review

The court of appeals' opinion is unanimous, "not precedential" and was summarily upheld on a petition for reconsideration and en banc review without dissent or a request for a response.

b. Petitioners Seek Mere Error Correction

Facially, the petition seeks to correct purported errors of the court of appeals. Pet.3 ("Petitioners . . . provide [a detailed factual statement]. . . . to demonstrate the errors of the Third Circuit. . . ."); and, Pet.28

("Point III. . . . The Third Circuit Performed [a De Novo Review of the Record] Improperly Under the *Jackson* Standard. . . ."). It thus runs afoul of SCR 10.

Additionally, resolution of this fact-bound issue requires review of the entire 5,000-page trial record. Doing so would not be a good use of the Court's resources. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

c. Petitioners Urged the Court Below to Apply the Standard of Review They Now Challenge

The State argues that certiorari should be granted because the court of appeals purportedly applied an erroneous standard of review in considering Kamienski's sufficiency of evidence challenge under *Jackson* and §2254(d)(1). First, it argues the court of appeals should not have conducted a de novo review of the trial record. Second, it argues the court of appeals should have reviewed the sufficiency of evidence claim under §§2254(d)(2) and (e) of the AEDPA and not §2254(d)(1). However, the State told the court of appeals below that its role was to perform a de novo review of the record and to analyze the sufficiency of evidence issue under §2254(d)(1). Resp.App.26-27.

d. Petitioners' Misconduct Makes this an Inappropriate Case for Granting Certiorari

The State's misconduct at the court of appeals and prior proceedings is detailed throughout the Statement of the Case, *supra*. The court of appeals found that not only did the State submit a "misleading," "unhelpful" and "totally improper" memorandum of law to it, but that the State submitted a similarly misleading brief to the state intermediate appellate court and thereby improperly "caused the state [court] to rule the way they did." Resp.App.22. During questioning at oral argument the court of appeals also exposed the State's attempt to establish a fundamental factual issue (namely, whether there was any evidence Kamienski knew in advance of his codefendant's intention to kill the victims and steal their cocaine) with purported evidence that did not exist anywhere in the record. Resp.App.22-26.

The State has continued the same pattern of misconduct in the instant certiorari petition, as also outlined in the Statement of the Case, *supra*. This includes: repeatedly using the word "buyers" to include Kamienski, Pet.6,31-33, when he was not one of the cocaine buyers; pressing factual and legal arguments that are diametrically opposed to ones the State had taken in earlier proceedings; asking this Court to draw an inference of premeditation that the State never presented to the jury, the trial court, the state appellate courts, the district court or the court of appeals (namely, the presence of the two blankets and towel recovered with the victims establishes

Kamienski brought these items to the crime scene with intent to conceal the bodies, Pet.35-36); urging the Court effectively to ignore the jury's acquittal of Kamienski on the murder conspiracy charge by arguing for inferences of his knowing participation in concerted actions with his codefendants prior to the murders; and misstating that the State's theory at trial "was that Kamienski's actions *before, during and after* the crimes proved his guilt as an accomplice to robbery and murder," Pet.5 (emphasis added), when, in fact, the prosecution repeatedly told the jury and trial judge that the State's theory of accomplice liability was based solely on "what happened *at the scene* . . . *after* he arrived there that evening." Resp.App.16-17 (emphasis added); *see also* Resp.App.13-14.

But, the most disturbing aspect of the State's ongoing misconduct is its continued misrepresentation that the trial record shows Kamienski met with the victims at the Holiday Inn on the evening before the murders and actively "lured" them to a death-trap the next day. On at least four occasions, the State lists this as the primary example of evidence that the state appellate court supposedly got right and the court of appeals supposedly got wrong:

> The [state appellate] court found that Kamienski . . . and his co-defendants had *lured* the victims to a private place so the crimes would not be detected. . . ."

Pet.2 (emphasis added); *see also* Pet.3,31,33.

However, the trial record establishes unequivocally Kamienski never met with the victims any time that day. *See* Statement of the Case, *supra* pp.23-29. Even the State's basic factual premise is wrong. It repeatedly says the drug "exchange originally was to occur [at the Holiday Inn]," Pet.2,3,6, when, in fact, the record conclusively establishes the victims always contemplated it would take place "near to," but not at, the hotel. Resp.App.7 and 13.

e. The Issue Petitioners Raise Occurs Rarely and Even More Rarely In the Context of this Case

"[T]he grant of habeas relief on a sufficiency-of-evidence claim is *extremely rare*." Pet.16 (emphasis added). Only a few federal appellate decisions have upheld habeas relief for state prisoners on this ground under the AEDPA. Because it is extremely rare, no pattern of confusion or lack of uniformity has emerged.

Such relief is even rarer in the context of the instant case. This is a purely circumstantial homicide case, premised on accomplice liability; where the prosecutor acknowledges there is no evidence the accomplice knew in advance of the plan to rob and kill the victims or that he had any role in the killings themselves; where the jury acquits him of conspiracy to commit murder, but convicts him of being an accomplice to murder based exclusively on his purported role in disposing of the bodies afterwards; where the trial judge sets aside the convictions after

a lengthy trial because of insufficient evidence; and finally, where the state seeks and obtains a reversal of the trial court's acquittal by submitting a misleading recitation of the trial record in its appellate brief. *See* Statement of the Case, *supra*.

f. The Court Has Denied Certiorari in Similar Cases

This Court denied certiorari in the most analogous reported case of which Kamienski is aware, *Juan H. v. Allen,* 408 F.3d 1262, *cert. denied*, 546 U.S. 1137 (2006) (insufficient evidence of aider and abettor's shared intent and concerted action in homicide case); *see also Chein v. Shumsky,* 373 F.3d 978, 993 (9thCir.2004), *cert. denied*, *sub nom. Shumsky v. Chein*, 543 U.S. 956 (2004) (insufficient proof of the materiality of perjurious testimony); *Cain v. Perez,* No. 08-268 (5thCir.), *cert. denied,* 129 S.Ct. 496 (2008) (insufficient evidence to rebut of insanity defense). The Court also denied certiorari in nine of the 18 cases which the State claims evince a conflict among the circuits. App.162-63. For all its case citations, the State omits the cases' subsequent history.

g. There Is no Bona Fide Conflict Among the Circuits on the Issue Presented Here

The State's reliance on a claimed conflict between the unpublished court of appeals' opinion below and published opinions in other circuits is an attempt to involve the Court in resolving a fictitious conflict. A comparison of the opinion sub judice and the 18 other

court of appeals' opinions cited by the State (in the appendix, not body, of the certiorari petition, contrary to SCR 24.3) shows there is no conflict. All the courts apply essentially the same standard of review. Thus, there is no reason to think the result below would have been different if Kamienski's habeas petition had been adjudicated by any other court of appeals listed by the State.

Moreover, 15 of the 18 cases the State lists in the appendix involved appeals where state convictions were upheld upon federal habeas review, not reversed by the federal court, as here. Therefore, the states there never pursued a standard of review challenge because they had prevailed below. Additionally, most of the State's cited cases involve habeas challenges to criminal convictions primarily on some ground other than sufficiency of the evidence (most commonly ineffective assistance). Where these opinions address sufficiency of evidence at all, it is very much a peripheral issue that is dealt with summarily or in dicta.

h. The Instant Case Is Not Similar to *McDaniel v. Brown*

The State claims it seeks consideration of the same issue presented in *McDaniel v. Brown*, No. 08-559, *cert. pending*, 129 S.Ct. 1038 (2009). Pet.1 & n.1. *McDaniel*, however, is unique. It presents the question of whether a state prisoner can use post-trial scientific expert testimony in a federal habeas proceeding to negate in-trial testimony of a state's

scientific expert. Although scheduled for oral argument on October 13, 2009, *McDaniel* was removed from the calendar after the habeas petitioner there conceded in his reply brief that the case did not present a question of sufficiency of evidence, but rather, whether the state violated his due process rights by improperly using bad science testimony.

i. The Court of Appeals' Decision Was Correctly Decided

As shown in the Statement of the Case, *supra*, the court of appeals properly held that Kamienski was entitled to habeas corpus relief under §2254(d)(1) on grounds of insufficient evidence. It applied the limited standard of review set forth in *Jackson* to the trial record and correctly concluded the State had failed to satisfy the mens rea and actus reus elements for either the "planning" or "commission" prongs of New Jersey's accomplice liability statute. App.2,19-20,25-26,30-31. *Accord Piaskowski v. Bett*, 256 F.3d 687, 691-93 (7thCir.2001) (proof of presence at the murder scene and an earlier assault of the victim, could not overcome insufficient evidence of participation in the murder itself); *Brown v. Palmer*, 441 F.3d 347 (6thCir. 2006) (proof of presence at the scene of the crime and relationship with the gunman were insufficient to establish prisoner aided and abetted gunman).

The court of appeals also rightly concluded that the state appellate court's contrary ruling was an

"unreasonable application" of *Jackson* because it had improperly "conflated" proof of Kamienski's role in the drug deal with proof of his role in the murders. App.30-31.

The court of appeals' ruling effectively restores Kamienski's case to its status at the conclusion of post-trial motions 20 years ago, where the judge who oversaw the trial dismissed the jury's murder convictions against Kamienski because of insufficient evidence. Resp.App.1-6. It is also consistent with statements of the trial prosecutor, who repeatedly acknowledged in closing arguments and post-trial motions there was no evidence Kamienski had any foreknowledge of the robbery and murders or that Kamienski had participated in the actual killings in any way. Resp.App.13-14 and 15-17, respectively.

Finally, the court of appeals' opinion is consistent with the jury's verdict acquitting Kamienski of conspiring to commit robbery and murder. Although theoretically, if there had been some evidence he assisted Marsieno during the robbery and murders, then Kamienski could have been acquitted as a conspirator and convicted as an accomplice without it technically being an "inconsistent verdict." However, as the court of appeals concluded after what it said was a "careful review of the record" under the "very deferential standard" that limited its inquiry, App.2, there was no evidence that Kamienski did anything during the murders to lawfully convict him under New Jersey's accomplice liability statute.

j. The Result Would Be the Same Under §§2254(d)(1) and (e)(1)

There is no basis to carve out the sufficiency of evidence ground for habeas relief from §2254(d)(1) and permit it only under §§2254(d)(2) and (e)(1), as the State urges. But, even if one were to do this, the result would be the same here. As shown in the Statement of the Case, *supra*, even with a rebuttable presumption of correctness as to the State appellate court's factual determinations, and allowing one to overcome this presumption only with a showing of clear and convincing evidence, the state appellate court's holding could not stand. That court's view of the trial record was fundamentally flawed, owing to the State's submission of a materially misleading brief.

CONCLUSION

For the forgoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

TIMOTHY J. MCINNIS, ESQ.
Counsel of Record
LAW OFFICE OF TIMOTHY J. MCINNIS
521 Fifth Avenue, Suite 1700
New York, New York 10175
(212) 292-4573

Attorney for Respondent

OPINION OF STEVEN P. PERSKIE, P.J. CR.

NEW JERSEY SUPERIOR COURT, LAW DIVISION, OCEAN COUNTY

December 21, 1988

MOTIONS FOR NEW TRIALS OR JUDGMENTS OF ACQUITTAL

Defendant Marzeno moves for a new trial because the jury verdict was "against the weight of the evidence." R.3:20-1. The court may grant such relief only if clearly and convincingly satisfied that there has been a "manifest denial of justice under the law." The jury had the opportunity to "pass upon the credibility of the witnesses," and there was more than enough evidence to sustain the verdict as to defendant Marzeno on all counts of the indictment submitted to the jury. The motion must therefore be denied.

Defendants Alongi and Kamienski move for a new trial, R.3:20-1, or for the entry of judgment of acquittal, R.3:18-2. A new trial may be granted "if required in the interest of justice," while a judgment of acquittal may be entered only upon a finding that the evidence is insufficient to sustain a verdict of guilty.

Defendants Alongi and Kamienski were charged with murder and felony murder as accomplices or conspirators, or both. The jury was instructed that they could be found guilty as principals in the murders and felony murders for any conduct undertaken as an accomplice, defined as any act done before, during or after the crime with purpose to promote or

facilitate the commission of the crime. The instruction explained the difference between being an accomplice and a conspirator. An example was used to illustrate the applicable legal principles, involving a hypothetical bank robbery where the perpetrator, without prior arrangement, enlisted the knowing aid of a friend in driving him to the airport to effect his escape. The example was correct on *its* facts, but not on the facts of this case. In the example the theft, the unlawful taking or receiving, was still underway when the friend drove the perpetrator to the airport, and thus the actions of the friend were undertaken "during" the commission of the offense, and with the purpose of promoting or facilitating its completion. In this case the actions of defendants Alongi and Kamienski in disposing of the bodies were undertaken after the robbery and murders had already been completed. This conduct is consistent with a purpose to hinder apprehension rather than a purpose to promote or facilitate the commission of the robbery and murders. This is the old "accessory after the fact" theory that was codified as N.J.S.A. 2A:85-2 prior to the enactment of the Code of Criminal Justice, and is now embodied in N.J.S.A. 2C:29-3. *State v. Lynch*, 79 N.J. 327, 339 (1979).

The instruction was in error on the subject of accomplice liability, in that it permitted the jury to consider the actions of defendants Alongi and Kamienski in disposing of the bodies as a basis for accomplice status in and of themselves, rather than as merely evidence from which inferences could be drawn as to the purpose of the conduct by the two of

them before or during the robbery and murders. Given the verdict, which acquitted defendants Alongi and Kamienski of conspiracy to rob or to murder, the jury unquestionably determined them guilty of the murders and the felony murders as accomplices. This mandates the conclusion that the error in the instruction had the capacity to affect the jury's verdict. It is therefore necessary to set aside the jury verdicts on the murder and felony murder charges against defendants Alongi and Kamienski.

The next question is whether to order new trials on those charges or, in the alternative, to enter judgments of acquittal. R.3:20-1; R.3:18-2. The verdict acquitting defendants Alongi and Kamienski of the conspiracy to rob or to murder would preclude a retrial on the theory that they were chargable as principals for the murders or felony murders by reason of their *conspiracy* status. This would leave for retrial only the charge that these defendants were guilty of the murders and felony murders as *accomplices*. There is not sufficient evidence to support such a verdict. While it can be argued that all of the conduct of defendants Alongi and Kamienski before the afternoon of the 19th is consistent with accomplice liability and the requisite purpose to promote or facilitate the crimes of robbery and murder, the verdict acquitting them of conspiracy to rob or to murder renders this theory untenable. If defendants Alongi and Kamienski did not conspire to commit these crimes, they could be charged therewith in a new trial only as accomplices and only on the basis of their actions

during the commission of the crimes. There was no evidence of their conduct during the commission of the crimes except, inferentially, their presence at the scene, which would not by itself suffice to sustain a verdict. The State relies upon this inference to sustain the further inference that defendants Alongi and Kamienski assented to the robbery and murders, lent to the crimes their countenance and approval, and thereby are chargable therewith as accomplices. This latter inference, however, rests not upon any *evidence* of their presence at the scene of the crimes but upon the *inference* of their presence. Thus there does not appear to be sufficient evidence to establish the requisite purpose to promote or facilitate the crimes of robbery or murder, as opposed to the crime of possession of controlled dangerous substance with intent to distribute, in the conduct of defendants Alongi and Kamienski prior to or during the meeting on the afternoon of the 19th.

In substance, the jury found that the State had not proved beyond a reasonable doubt that defendants Alongi and Kamienski knew of and agreed to aid in the robbery and murders before they were committed, even though the jury obviously believed the testimony of Donna Duckworth as to her observations at the Alongi house on the night of the 19th. Given that there was no evidence of the actions of defendants Alongi and Kamienski during the commission of the crimes, as opposed to afterwards, the jury's verdict would logically also have been "not guilty" on the accomplice theory if the instruction on

that subject had been correct. The appropriate remedy, then, for the error in the instruction is to enter judgments of acquittal on the murder and felony murder charges as to defendants Alongi and Kamienski. R.3:18-2.

"What, then of the remaining verdicts against defendants Alongi and Kamienski, and the verdicts against defendants Marzeno? The first question is whether the error in the instruction had any capacity to affect the verdicts in question. With respect to the remaining charges against defendants Alongi and Kamienski, and all the charges against defendant Marzeno, the law of accomplice liability was not involved. Each of the defendants was charged as a principal in the crimes in question. The error in the instruction had no capacity to affect the verdicts on those charges. Furthermore, there was ample evidence before the jury to sustain each of the verdicts. Accordingly, the remaining verdicts are not subject to any remedial action by the court and must stand as returned.

Lastly, defendants suggest relief is in order for the failure of the court, on its own motion, to instruct the jury on the charge of hindering, N.J.S.A. 2C:29-3. While it is true, as asserted by defendants, that the court has an affirmative obligation to search the record and to instruct the jury as to any included offenses that the evidence would sustain; and while it is also true that the evidence in this case would justify a charge of hindering ("suppress[ing], by way of concealment . . . any evidence of the crime"), the

court's authority and responsibility in presenting included offenses to the jury extend only to those charges that are "included" within the scope of the charges returned in the indictment. N.J.S.A. 2C:1-8(d). Hindering, as defined in N.J.S.A. 2C:29-3, is not an offense included within the elements of murder or felony murder, and accordingly could not have been presented to the jury with or without a request by defendants. There is therefore no basis for relief from the jury verdicts on these grounds.

In conclusion, judgments of acquittal will be entered on the first, second and fifth counts of the indictment in favor of defendants Alongi and Kamienski. The remaining motions are denied. Sentence will be imposed on defendants Marzeno on the first, second, fifth, sixth and seventh counts, and on defendants Alongi and Kamienski on the sixth and seventh counts.

Steven P. Perskie, P.J.Cr.
December 21, 1988

Excerpts from Direct Examination of Sidney Jeffrey, III, State of New Jersey v. Marzeno, et al, Ind. No. 692-10-87, Superior Court of New Jersey, Law Division, Ocean County, 10/28/1988.

* * *

[135] Q. Now, what did you do at this point in time when they talked to you about a three kilo – three kilos to bring up?

A. Well, I told them that I would, you know, look into it in Florida.

People that I knew there and Nick told me when I got it together, to come up to the Holiday Inn in Toms River.

He told me where it was, and the reason he wanted to do that was because that was close to where the deal was going to take place.

* * *

[138] Q. When is the next time that you saw him?

A. The next time I saw him was at the next day at 11:30 in the morning.

He drove by and asked me to come out to the car because he didn't want to come into the hotel.

* * *

Q. All right. Now, how did you know to wait for Nick DeTournay outside the Holiday Inn at 11:00 or 11:30 on the 18th?

A. Well, he called and told me that he would be by to pick me up.

Q. Okay. What did he tell you when you got in the car?

A. When I got into the car with him, he told me that the people still weren't ready and they were getting their money together and –

Q. Did he indicate where he had just come from?

A. They had just come from the people that were getting the money together.

Q. Okay. Did he indicate to you when the deal was going to be now?

MR. CAMMARATA: Judge, I would object to the leading nature of that question.

MR. MILLARD: Judge, with all due respect, I am asking –

THE COURT: No, I will permit it.

A. It was supposed to take place the next day at three o'clock.

* * *

Excerpts from Cross Examination of Sidney Jeffrey, III, State of New Jersey v. Marzeno, et al, Ind. No. 692-10-87, Superior Court of New Jersey, Law Division, Ocean County, 11/1/1988.

* * *

[14] Q Okay. So there was no problem for Nick to come to the Holiday Inn on the 18th –

A He didn't come into the Holiday Inn, sir.

Q Let me finish my question.

There's no problem for him to come and park outside of the Holiday Inn on the 18th and pick you up in the morning. Is that right?

A No, it's not, sir. He never came into the grounds of the Holiday Inn.

* * *

[26] Q Okay. So at around six o'clock on the 18th, you're in the bar at the Holiday Inn, in Toms River, right?

A Yes, sir.

Q Okay. Remember who was there?

A Beg your pardon?

Q Do you remember any of the people that were there?

A No, sir. I remember a bartender.

Q A bartender?

A Yes, sir.

Q So there's nobody now that you recollect being in the Holiday Inn on the 18th around six o'clock, nobody specifically?

A No, sir.

* * *

[29] Q No. No. You're not listening to me. When he drops her off, he wasn't going to come anywhere near the Holiday Inn, right? 'Cause he looked too much like a hippie?

A Right.

* * *

Excerpts from Direct Examination of Donna Sue Duckworth, State of New Jersey v. Marzeno, et al, Ind. No. 692-10-87, Superior Court of New Jersey, Law Division, Ocean County, 11/2/1988.

* * *

[37] Q I'm sorry. Sunday, September 18th.

A Um-hum.

Q Do you have a – do you have a recollection of being at the Holiday Inn on that day?

A Yeah. As to my best memory, we were there [38] around six o'clock, around that time. I don't know if it's five or six. Happy hours we went there.

Q Happy hour is the reason you went there?

A Yeah. Cocktails.

THE COURT: Is that in the afternoon or the morning?

THE WITNESS: No. Five o'clock, like dinner time.

Q And who else was there? Did you meet anybody else there?

A Joe Marzeno, Tony Alongi, Jackie, myself, Paul.

Q Were you talking to Paul and Joe and –

A Not really. I was just – I remember talking to Jackie. I wasn't really talking to them.

Q Do you know what they talked about on that day?

A I really wasn't listening.

[39] Q Did anybody else show up?

A As I recall, Buddy stopped in, but it's not –my – the way I saw it, it's not like he stopped in to meet anyone. I think he was there on his own.

* * *

Excerpts from Transcript of Proceedings, State of New Jersey v. Marzeno, et al, Ind. No. 692-10-87, Superior Court of New Jersey, Law Division, Ocean County, 11/16/1988 (Closing Argument of Assistant Ocean County Prosecutor E. David Millard).

* * *

[262] We know when he gets in, he gets in on the seventeenth, that's the day he checks in at the Holiday Inn, which is where he's told on the check-in on the Holiday Inn in Toms River, that's near to where the deal is going down.

* * *

[266] Donna Duckworth tells you that there's a meeting at the Holiday Inn later on that day, cocktail hour, and she testifies that she's there, Marzeno's there, Alongi, Kamienski, Jackie Sullivan, and she's very honest, she does not recollect any conversation of what took place. She says the men were sort of together, she was just BS'ing with Jackie Sullivan, but she recollects being there. And she also indicated to you that it wasn't that unusual. She also tells you that she doesn't see the DeTournays, they weren't there, ...

* * *

[276] And I'm going to say does Paul Kamienski necessarily know that they're going to get killed? I don't think so. Not from the evidence and the testimony that I've heard. Paul Kamienski is there because

he is part and parcel, he put this drug deal together, he made it work, he was there.

And you know what, Tony and Joe, they didn't have any money, but you know what they had, they had a gun and they [277] killed the DeTournays. They murdered them. They murdered them in cold blood. And Kamienski was there and that didn't end the murder, a bullet through the chest or through the head did not end a murder, a murder is finished and the murder ended when that body is disposed of. And I submit to you that what occurred at that point in time was that Paul Kamienski assisted Marzeno and Alongi in getting rid of the bodies. That he assisted, he helped, he rendered his countenance to that in getting rid of the bodies. He was there. He never – I'll say this, he never expected it to happen, he didn't expect them to be murdered. He said that to Donna as soon as they got outside, I couldn't control the situation, but it happened. And he was there and he helped dispose of the bodies.

* * *

[296] And I've indicated to you that I don't think that Paul Kamienski – I don't think that the was a part of a conspiracy to murder those people, I think he very clearly was a part of the conspiracy, that second conspiracy, also to possess that cocaine with intent to distribute it.

* * *

Excerpt from Transcript of Motions and Sentence, State of New Jersey v. Marzeno, et al, Ind. No. 692-10-87, Superior Court of New Jersey, Law Division, Ocean County, 12/21/1988 (Oral Argument of Assistant Ocean County Prosecutor E. David Millard).

* * *

[63] And Mr. Cammarata said that I argue in my brief here that now that Mr. Kamienski was part of this plan, the murder, well, he obviously misread the brief because that's not what I said.

In fact, I say that it is not necessary that there was a plan known to Kamienski in advance of his arrival at the house on that occasion for him to still be guilty as an accomplice to murder, and that certainly is the state of the law.

* * *

THE COURT: Let me ask you this: Let's take that apart. I gather you are acknowledging, because you acknowledged to the jury, and I think you would have had a tough time here of saying otherwise, that there is no way in which Kamienski could be accountable, and I am going to use Kamienski as shorthand, I suggest to you that the jury's verdict suggest that Alongi and Kamienski are in the same posture.

But let's leave that for the moment. There is [64] no way that Kamienski could be responsible for the murder on the basis of anything that happened before

they all got to the Alongi house on the afternoon of the 19th.

Are you with me there?

MR. MILLARD: As to Kamienski?

THE COURT: All right.

MR. MILLARD: As to Alongi, I disagree with you.

THE COURT: Let's pass the question of Alongi for the moment.

I think you are in some difficulty in trying to make a distinction between the two of them.

You indicated to the jury, and I think you had to, and I think you were correct that there is nothing that suggests by the requisite standard that prior to the afternoon of the 19th he knew of and agreed to assist in or conspired to commit a robbery or a murder.

MR. MILLARD: I agree.

THE COURT: And the jury so found.

MR. MILLARD: I agree with you.

THE COURT: All right. Starting from that, in order to have him be guilty as an accomplice and not as a conspirator, that would have to be based on what happened at the scene. Would it not?

MR. MILLARD: I agree.

* * *

[71] Mr. Millard:

* * *

Even if he doesn't know, and let's assume, and that's certainly what I argued to the jury, that when he arrived there on that evening, he was not aware of any plan to murder these individuals. It becomes apparent to him during the course of conduct, the course of events that take place there at the scene, he is an accomplice. . . .

* * *

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April 3, 2009

Via Facsimile
and Electronic Mail

Samuel J. Marzarella Esq.

RE: Kamienski v. Hendricks, et al
Case Number: 06-4536
District Case Number: 02-cv-03091
Listed: for Oral Argument on Thursday, April 16, 2009

Dear Counsel:

At the direction of the Court, "On Page 52 of the Brief for Appellees, Counsel for Appellees states: "Defendants never intended for the drug deal to have occurred. Defendants duped the DeTournays into thinking it would occur by lying about having trouble getting the nonexistent money. This is shown by the fact that there was never any money intended to be paid to the DeTounays." On Page 52, of the brief Counsel states: "Between September 10th and September 15th, . . . Defendants assured Buddy

Lehman . . . ". **Counsel is hereby directed to submit a letter to the Court no later than Wednesday, April 8**, stating whether "Defendants" as used in those paragraphs includes Appellant Kamienski, and if so, where in the Appendix the Court can find testimony to support this claim. If the testimony is not in the Appendix, but in the trial transcript, copies of the relevant pages of the transcript are to be included with the letter; the Court will accept those copies as a Supplemental Appendix, and Counsel should therefore comply with the requirements for submitting an Appendix (number of copies) when submitting the supplemental materials.

Please file the Letter using the "response event" under the argument notices and acknowledgment category in CM/ECF.

Finally, the Brief submitted by Counsel for Appellees refers only to portions of the trial transcript rather than to the Appendix that was submitted. It is therefore virtually useless insofar as it purports to support the representations made in the brief. Counsel is to submit a revised brief that replaces all citations to the trial transcript with citations to the Appendix. If counsel has cited portions of the trial transcript that are not included in the Appendix, **Counsel is hereby directed to provide those additional portions to the court in the form of a supplemental appendix no later than close of business on Friday, April 10th.**

Very truly yours,

/s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

By: Tiffany Washington
Tiffany Washington, Calendar Clerk
267-299-4905

cc: Timothy J. McInnis Esq.

Excerpts from Transcript of Oral Argument Kamienski v. Hendrix, no. 06-4536, U.S. Court of Appeals for the Third Circuit, 4/16/2009.

* * *

[4] THE COURT: Is sufficiency of evidence a question of law under (d)(1) or a fact under (d)(2)?

MR. McINNIS: Yes, that's correct.

THE COURT: Which?

MR. McINNIS: It's both.

THE COURT: Okay.

MR. McINNIS: Oh, I'm sorry. Sufficiency of the evidence is under (d)(1) where we say that the state appellate court made an unreasonable application of the Jackson standard. And the argument under (d)(2) and (e) is that the various fact finding it made were clearly erroneous.

THE COURT: Go ahead. I just wanted to get your view.

* * *

[20] THE COURT: Maybe you can start by helping me out with the problem I had as I read your brief and became almost apoplectic. Why would you put in your brief evidence against Kamienski and then put in parentheses admitted only insofar as Maiano, or whatever his name, Marzeno was concerned?

And even in your response you've got at one point evidence that you put in here and then there's a footnote: "The parties discussed a cocaine deal" – this is on page two of your response in response to his affidavits. "The parties discussed a cocaine deal. This was stricken from the record."

If it's stricken from the record why in the world would you put that in your brief and argue it? And you do that repeatedly throughout your brief. You'll say that the evidence is such and such and then you'll put in parentheses admitted only as to codefendant.

MR. MARZARELLA: Well, I think it's important –

[21] THE COURT: It's improper, that's what it is, it's totally improper.

MR. MARZARELLA: I apologize to the court if that's improper, Judge. That was what was done at the state level.

THE COURT: That's his point.

MR. MARZARELLA: Yes, and –

THE COURT: And that's what caused the state to rule the way they did.

* * *

[31] THE COURT: Forget what you know for sure. What does the evidence show? What does the [32] record show about where he was?

MR. MARZARELLA: Well, the record shows that he was at the Holiday Inn, that he was speaking with the three – the two other defendants, and that Duckworth was not privy to their conversation. He was there at 6 o'clock, and at 8 o'clock a lot of things happened. All the parties on their way home were talking about how this was a bust.

THE COURT: Wait, wait, wait a minute. Where is there evidence that Kamienski was involved in a conversation that this was a bust?

MR. MARZARELLA: Well, what we're, what I'm trying –

THE COURT: Didn't you just say that, all the parties were talking about on the way home this was a bust? That's what you just said.

MR. MARZARELLA: I don't think that we need to show –

THE COURT: Isn't that what you just said?

MR. MARZARELLA: Yes. Yes.

THE COURT: All the parties.

MR. MARZARELLA: Yes.

[33] THE COURT: Where's the evidence to support that, or an inference to that effect?

MR. MARZARELLA: The inference goes as follows, Judge. Kamienski left at 8 o'clock, or was, at least we can say he was at his boat between 8 and 9

o'clock, along with everyone else who left. Eight o'clock was the time when everybody pretty much scattered. And in Henry DeTournay's, the victim's words, when he called Sid Jeffrey he called him at 8 o'clock and said, No, we're going to do it on the 19th, the next day.

Buddy Lehman said that Marzeno had previously promised to him to be at his residence between six and –

THE COURT: If Nick DeTournay made that call then, the only thing that you could infer from that is that whatever happened inside the Holiday Inn room did not suggest anybody who didn't otherwise know that the DeTournays were going to get ripped off.

He's still thinking that they're having trouble getting the money together.

MR. MARZARELLA: That's true.

THE COURT: He didn't see a gun, I [34] would assume. Was there anything to suggest that he did?

MR. MARZARELLA: No, he didn't. No, he didn't.

THE COURT: So help me again, where – you said a few minutes ago that all of them were talking about this was going to be a bust. How do you get there?

MR. MARZARELLA: Well, the concerted action, Judge, everyone left at a specific time, only two hours after Duckworth placed all the defendants in each other's company. And so we can infer, I think it's a reasonable inference, that there was a meeting at the Holiday Inn. And by the way, as I said at the outset –

THE COURT: But finish that train of thought, we can infer that there was a meeting that – go ahead.

MR. MARZARELLA: At the Holiday Inn with respect to this drug deal that was supposed to have occurred. Now, we can also infer that it was a robbery from the get-go because there was never any money and that's all throughout the record.

THE COURT: That doesn't – we're [35] going around in one huge circle here. Where is the evidence from which a jury could infer that Kamienski knew there wasn't going to be any money? That was the question Judge Van Antwerpen started –

MR. MARZARELLA: I'm sorry, your Honors, I'm doing the best that I can to answer your question.

THE COURT: That may not be any fault of yours. It may simply be a fault of the record.

THE COURT: Maybe the evidence isn't there. Yes, maybe the evidence isn't there.

* * *

[37] THE COURT: . . . . Marzeno was planning to rip these folks off, says he'll kill them before he gets any money.

If you can point me to somewhere in the record where Kamienski heard that that would be incredibly helpful. But I haven't heard that yet.

And we're still trying to find out what in the record suggests Kamienski knew this was going to be a robbery, which would then get you felony robbery, I think, or felony murder?

I'm still looking for that.

* * *

THE COURT: Under 28 – 2254(d)(1) do you agree that the sufficiency of evidence is a question of law under (d)(1)? Defense counsel said it was.

MR. MARZARELLA: It's a question of a due process question. Certainly that, the constitutional question of law, yes, but I think that that's a little bit different from being the, acting as the trier of fact at the inception.

I mean you, you respectfully, I think your role is to find whether evidence is sufficient, whether there's anything in the record that, reasonable that the jury could –

THE COURT: There's a standard of deference – yes or no, are we under 2254(d)(1) or (d)(2)? Which standard applies?

MR. MARZARELLA: I think it's (d)(1), your Honor.

THE COURT: Okay.

* * *

Excerpt from Ocean County Prosecutor's Office Memorandum of Law in Opposition to Appeal by Anthony Alongi, no. 06-4419, U.S. Court of Appeals for the Third Circuit, filed 9/2/2009.

* * *

[39] On September 18, 1983, when the deal was originally supposed to happen, Nick went to the appellant's house without the cocaine, where he spoke with the appellant. Nick shortly thereafter saw Jeffrey and told him that "they were having trouble getting the money together" and that the deal would be postponed until September 19 at 3:00. (Ra127-128, 101-103)

* * *

Supreme Court, U.S.
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No. 09-395

In The
Supreme Court of the United States

MICHELLE R. RICCI, ASSOCIATE ADMINISTRATOR, NEW JERSEY STATE PRISON; ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; OCEAN COUNTY PROSECUTOR'S OFFICE,

Petitioners,

v.

PAUL KAMIENSKI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF PURSUANT TO RULES 15(2) AND 15(8)

TIMOTHY J. MCINNIS, ESQ.
Counsel of Record
LAW OFFICE OF TIMOTHY J. MCINNIS
521 Fifth Avenue, Suite 1700
New York, New York 10175
(212) 292-4573

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Wood v. Allen, No. 08-9156 1

STATUTES

28 U.S.C. § 2254(d)(1) 1

28 U.S.C. § 2254(d)(2) 1

28 U.S.C. § 2254(e)(1) 1

RULES

Sup. Ct. R. 14(i)(i) 3

Sup. Ct. R. 15(2) 1

Sup. Ct. R. 15(8) 1

Respondent Kamienski submits this supplemental brief pursuant to Rules of the Supreme Court of the United States ("SCR") 15(2)[1] and 15(8)[2] to advise the Court of a material misstatement of the record in Petitioners' reply brief, dated November 13, 2009 ("Rply.Br.").[3] This misstatement concerns the trial court's findings with respect to sufficiency of evidence.

ARGUMENT

The trial court unequivocally found there *was not* sufficient evidence of antecedent conduct to support Kamienski's murder convictions under an accomplice liability theory. Surprisingly, in their reply brief Petitioners claim for the first time that the trial court "found" there *was* such evidence. To support this contention, they purport to quote a sentence from the trial court's written opinion. But, a review of the

[1] "Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." SCR 15(2).

[2] "Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to . . . intervening matter not available at the time of the party's last filing." SCR 15(8).

[3] Kamienski also briefly addresses Petitioners' reliance on *Wood v. Allen*, No. 08-9156 (submitted after oral argument on November 4, 2009). Rply.Br.2. Not only is that case's question limited to the construction of §§ 2254(d)(2) and (e)(1), but it also concerns ineffective assistance of counsel. The instant matter concerns the application of § 2254(d)(1) to a claim of insufficient evidence.

actual written opinion reveals that Petitioners selectively quote from only part of the sentence at issue, thereby reversing its intended meaning. Petitioners also mischaracterize the nature of the trial judge's action as well, transforming the trial court's paraphrasing of the prosecution's "theory" – which it renders "untenable" – into a supposed factual "finding." In short, Petitioners completely distort the trial court's record concerning what they concede is a central issue for the Court's consideration.

Specifically, in their reply brief, Petitioners make the following assertion:

> The trial court's ruling was fully discussed and then reversed by the appellate division, which noted that, notwithstanding its granting of judgment n.o.v., *the trial court had found that, "[a]ll of the conduct of defendants Alongi and Kamienski before the afternoon of the 19th is consistent with accomplice liability and the requisite purpose to promote or facilitate the crimes of robbery and murder."* (Resp.App.3)

Rply.Br.4 (emphasis added; citation in original).

The above quotation purports to be from the following sentence in the trial court's written opinion dated December 21, 1988, see Resp.App.1-5:

> *While it can be argued* that all of the conduct of defendants Alongi and Kamienski before the afternoon of the 19th is consistent with accomplice liability and the requisite purpose to promote or facilitate the crimes of robbery

> and murder, the verdict acquitting them of conspiracy to rob or to murder *renders this theory untenable*.

Resp.App.3 (emphasis added).[4]

When one compares the Petitioners' quotation with the actual opinion, it becomes clear that Petitioners deliberately omitted the beginning and ending parts of the trial court's sentence, which are needed to give it its intended meaning. First, the trial court began by stating, "While it can be argued," thereby, indicating it was restating the prosecution's theory, not finding a fact. Second, the trial court finished the sentence by concluding that the record "renders this theory untenable." Neither the "While it can be argued" nor "renders this theory untenable" phrases (or their substance) appear anywhere in Petitioners' quotation or elsewhere in the reply brief, and their absence causes Petitioners' purported statement of the record to be misleading.

Petitioners compound this mischaracterization by saying that "the [state] appellate division . . . noted" the trial court's supposed *finding* of sufficient antecedent evidence in reversing the judgment n.o.v. Rply.Br.4. Petitioners fail to cite where in the state

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[4] Petitioners did not include the trial court opinion in their appendix, even though they were required to do so under SCR 14(i)(i). And, they did not proffer their interpretation of that opinion, which Kamienski challenges here, until they filed their reply brief.

appellate division opinion that court supposedly made the claimed observation. There is good reason for this because the state appellate court merely quoted the entire sentence from the trial court opinion verbatim, as Kamienski sets out above; it made no attempt to turn the trial court's dismissal of the prosecution's theory into a finding of sufficient evidence. App.129.

Petitioners' purported quote from the trial court's written opinion is also misleading because it conflicts with the plain words the trial court used throughout the opinion, as well as, its express findings from the bench during oral argument on post-trial motions. For example, having noted in the written opinion that the jury acquitted Kamienski on the conspiracy to commit murder charge and having further concluded that it gave an erroneous jury instruction on accomplice liability, the trial court made the following factual findings with respect to insufficient evidence in the trial record:

> This would leave for retrial only the charge that these defendants were guilty of the murders and felony murders as accomplices. *There is not sufficient evidence to support such a verdict. . . .*[5]

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[5] In their reply brief, Petitioners also claim for the first time that the trial court did not dismiss the murder charges against Kamienski because of insufficient evidence. Rply.Br.4 ("The trial court [did not] enter[ ] judgments of acquittal on the robbery and murder convictions . . . because it found the evidence under

(Continued on following page)

> *There was no evidence of their conduct during the commission of the crimes except, inferentially, their presence at the scene, which would not by itself suffice to sustain a verdict. . . .*
>
> *Thus there does not appear to be sufficient evidence to establish the requisite purpose to promote or facilitate the crimes of robbery or murder* . . . in the conduct of defendant[ ] . . . Kamienski prior to or during the meeting on the afternoon of the 19th.
>
> In substance, *the jury found that the State had not proved beyond a reasonable doubt that defendant[ ] . . . Kamienski knew of and agreed to aid in the robbery and murders before they were committed. . . . Given that there was no evidence of the actions of defendant[ ] . . . Kamienski during the commission of the crimes* . . . the jury's verdict would logically also have been "not guilty" on the accomplice theory if the instruction on that subject had been correct.

Resp.App.3-5 (emphasis added).

Additionally, at least twice during oral argument on post-trial motions, the trial court indicated it found that there was insufficient evidence of Kamienski's antecedent conduct to support his murder convictions

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an accomplice theory was insufficient to sustain them."). This is clearly wrong as the cited portion of written opinion shows.

as an accomplice. The trial court noted:

> *There is no way that Kamienski could be responsible for the murder on the basis of anything that happened before* they all got to the Alongi house on the afternoon of the 19th. . . .
>
> You [Prosecutor Millard] indicated to the jury, and I think you had to, and I think you were correct that *there is nothing that suggests by the requisite standard that prior to the afternoon of the 19th he [Kamienski] knew of and agreed to assist in or conspired to commit a robbery or a murder.*

Resp.App.15-17 (emphasis added). The prosecutor agreed with both of the above statements by the trial court. Id.[6]

Thus, the court of appeals' unanimous decision, which was highly critical of the Petitioners' misleading

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[6] Accordingly, Petitioners are also wrong when they say Kamienski misconstrued the prosecutor's statement at the trial court proceedings as an admission there was insufficient evidence of antecedent conduct to sustain Kamienski's accomplice liability-based murder convictions. Rply.Br.4 ("The trial prosecutor's comment in summation that there was insufficient evidence to support a conviction on the conspiracy charges has been misconstrued by Respondent as pertaining to the evidence of his guilt under an accomplice theory."). As can be seen in the quoted colloquy, the trial court and prosecutor were discussing that lack of antecedent evidence for both "assisting in" and "conspiring to" commit robbery or murder, and they did not limit their comments to just "conspiracy," as Petitioners now claim.

briefs and oral argument,[7] is entirely consistent with the trial court's factual findings as to insufficient evidence, as Kamienski showed in his opposition brief, and is not inconsistent with the trial court's supposed finding of sufficient evidence, as Petitioners mistakenly argue for the first time in their reply brief.

CONCLUSION

That Petitioners misstate the record with respect to the "only" factual issue in Kamienski's opposition brief which they say they need to rebut, Rply.Br.4, underscores this is not an appropriate case to broadly construe various subsections of § 2254 with respect to all habeas petitions, regardless of the grounds on which they seek relief, as Petitioners urge. For this and the other reasons set out in his opposition brief, certiorari should be denied.

Respectfully submitted,

TIMOTHY J. MCINNIS, ESQ.
Counsel of Record
LAW OFFICE OF TIMOTHY J. MCINNIS
521 Fifth Avenue, Suite 1700
New York, New York 10175
(212) 292-4573

Attorney for Respondent

[7] The court of appeals further determined that Petitioners' misleading brief "caused" the state appellate court to rule erroneously. Resp.App.22. This determination is not just something Kamienski "assumed as a fact," as Petitioners claim. Rply.Br.3.

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No. 09-395

In The
Supreme Court of the United States

ROY L. HENDRICKS, Administrator, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, OCEAN COUNTY PROSECUTOR'S OFFICE,

Petitioners,

v.

PAUL KAMIENSKI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF

MARLENE LYNCH FORD
Ocean County Prosecutor
By: SAMUEL J. MARZARELLA
Counsel of Record
ROBERTA DIBIASE
WILLIAM KYLE MEIGHAN
CN 2191
Toms River, NJ 08754
732-929-2027

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

In reply to Respondent's brief in opposition, Petitioners respectfully ask this Court to consider the following points.

Respondent's presentation of his own version of the facts, rather than an examination of the state court's recitation of the facts, demonstrates the State's pivotal point – that habeas review under 28 U.S.C. §2254(d)(1) does not permit de novo examination of the facts to determine a question of law, i.e., whether the state court's opinion was contrary to or involved an unreasonable application of clearly established federal law. Limited review of the facts is permitted only under (d)(2) as circumscribed by the burden of proof in (e)(1), which provides that a prisoner must rebut the presumption of correctness of the state court decision by clear and convincing evidence.

In contrast to Respondent's challenge to the facts, Petitioners have relied upon and discussed the facts as found by the state court solely to demonstrate the Third Circuit's erroneous deprivation of the legitimate inferences from the facts made by the state court and accepted by the district court in favor of the prosecution.

The Third Circuit decided this case exclusively under (d)(1), specifically declining an analysis under (d)(2) and (e)(1). Thus, the State's petition seeks resolution of the only question presented: what is the appropriate standard of review under (d)(1), and what are the distinctions to be made by the courts among

(d)(1), (d)(2), and (e)(1) of 28 U.S.C. §2254 when evaluating habeas claims.

This Court has already signaled its interest in these issues and has acknowledged confusion in the federal courts concerning them. Petitioners know of no other (d)(1) case currently on the Court's calendar, but this case perfectly complements the issues recently presented in *Wood v. Allen*, which is a (d)(2) – (e)(1) case. (*Wood v. Allen*, No. 08-9156, submitted after oral argument on November 4, 2009.) The sufficiency-of-evidence claim here is the broadest of any of the claims made in a habeas case, and a decision granting the writ involves the greatest societal costs, because retrial is barred. The uncertain standard of review under (d)(1), particularly in a sufficiency claim, is ripe for resolution. Should this Court grant certiorari in this case, it could provide a complete resolution of the ambiguities that plague the language of 28 U.S.C. §2254(d)(1), (d)(2) and (e)(1).

Respondent's concession that the conclusions of the district court and state appellate court were in "sharp contrast" with those of the Third Circuit further demonstrates the need for clarification by this Court regarding the appropriateness of an exhaustive de novo review by a federal habeas court under (d)(1), performed many years and levels removed from the jury trial. (Resp.Br.7)

Further, Respondent's claim that the various circuit courts currently apply "essentially" the same standard of review in a sufficiency claim (Resp.Br.35)

is a concession in disguise that there is a lack of uniformity in this area. Respondent's additional argument that certiorari should not be granted because "resolution of this fact-bound issue requires review of the entire 5,000 page trial record" (Resp.Br.30) also demonstrates the same point, that the courts are in great need of guidance as to whether such extensive review is required or even permitted in a sufficiency claim under the narrow design of (d)(1). Indeed, this Court's statements at oral argument in *Wood v. Allen, supra,* reveal concern as to the type and extent of review permitted under the AEDPA.

Notably, Respondent has ignored Petitioners' discussion of the improprieties of the Third Circuit's opinion, in particular its unseemly shifting of the burden of proof to the State, its inappropriate reliance on a prosecutor's remark in summation, and its creation of inferences favorable to the prisoner despite its acknowledgement that he lied under oath to the jury.

Respondent's brief in opposition contains misinterpretations of the record below, of the State's arguments below, and of the petition now seeking certiorari before this Court. For example, as Respondent rewrote Petitioners' "Question Presented," he assumed as fact – although proof of same is not possible – that the state appellate court failed to read the record below but relied solely on the prosecution's factual recitation to reach its conclusion. A reading of the state court's opinion fully dispels this notion.

Only one of Respondent's misinterpretations of the record requires comment. The trial court entered judgments of acquittal on the robbery and murder convictions not because it found the evidence under an accomplice theory was insufficient to sustain them, but rather because the jury's acquittal on conspiracy to rob and murder precluded consideration of that same evidence under an accomplice theory. (Resp.App.3) The trial court's ruling was fully discussed and then reversed by the appellate division, which noted that, notwithstanding its granting of judgment n.o.v., the trial court had found that, "[a]ll of the conduct of defendants Alongi and Kamienski before the afternoon of the 19th is consistent with accomplice liability and the requisite purpose to promote or facilitate the crimes of robbery and murder." (Resp.App.3) The trial prosecutor's comment in summation that there was insufficient evidence to support a conviction on the conspiracy charges has been misconstrued by Respondent as pertaining to the evidence of his guilt under an accomplice theory.

In sum, Respondent is relying on non-evidential material in a sufficiency-of-evidence case, as did the Third Circuit Court of Appeals. Under any standard of review, reliance upon arguments of counsel would be inappropriate in deciding whether a state court unreasonably applied federal law to determine a sufficiency-of-evidence question.

Respondent's brief in opposition argues facts instead of law. Petitioners have posited an urgent

legal issue that is more than ripe for review, and respectfully request that this Court grant certiorari.

Dated: November 13, 2009

Respectfully submitted,

MARLENE LYNCH FORD
Ocean County Prosecutor
By: SAMUEL MARZARELLA
Counsel of Record
ROBERTA DIBIASE
WILLIAM KYLE MEIGHAN
Attorneys for Petitioners